INDEX.

PAGE

Argument 36-69
Assignment of Errors 36-69
Certification of Opinion of Kansas City Court of Appeals 35
Damages 60
Evidence 48-58
Instructions 61-65
Motion to Dismiss 1-2
Notice of Motion to Dismiss 3-4
Opinion of Kansas City Court of Appeals 6-35
Statement 5-35

Cases Cited.

Central Vermont Ry. Co. v. White, 238 U. S. 507 . . . . . 36, 59
Chrisman v. Miller, 197 U. S. 313 . . . . . 37, 49
Chicago, Burlington & Quincy Rd. Co. v. Chicago, 166 U. S. 226 . . . . . 37, 49
Chicago, Northwestern Ry. Co. v. Gray, 237 U. S. 399 . . . . . 60, 68
Chicago, R. I. & Pac. Ry. Co. v. Wright et al., 36 Sup. Ct. Rep. 185 . . . . . 60, 66-67
Del. Lack. & Western Ry. Co. v. Yurkonis, 238 U. S. 439 . . . . . 40, 41
Howard v. Ry. Co., 207 U. S. 463 40
Ill. Cent. Rd. Co. v. Behrens, 233 U. S. 473 40
King v. West Virginia, 216 U. S. 92 . . . . . 37, 49
Kansas City, Western Ry. Co. v. McAdow, 36 Sup. Ct. Rep. 252 . . . . . 59, 68
Lazarus, Michael & Lazarus v. Prentice, 234 U. S. 263 50
Mondou v. Ry. 223 U. S. 1 40

PAGE

M. K. & T. Rd. Co. v. Haber, 169 U. S. 613. . . . . 37, 50
Pederson v. Del. Lack. & Western Ry. Co., 229 U. S. 146. 40
Sect. 5425, Revised Statutes of Missouri of 1909 61
Sect. 5426, Revised Statutes of Missouri of 1909 60
Sect. 5427, Revised Statutes of Missouri of 1909 60
Sect. 5434, Revised Statutes of Missouri of 1909 60-61
Southern Ry. Co. v. Lloyd, 36 Sup. Ct. Rep. 210 68
Southern Ry. Co. v. Carson, 194 U. S. 136, 140. . . . . 37, 50
Shanks v. Del. Lack. & Western Ry. Co., 36 Sup. Ct. Rep. 188. . . . . 40, 41
3rd Edit. Foster on Fed. Prac., 5th Edit., page 2396. . . . . 37, 50
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86. . . . . 37, 49

In the

Supreme Court of the United States

October Term, 1915.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, *Plaintiff in Error,*

vs.

MARGARET HARRINGTON, *Defendant in Error.*

Writ of Error to the Kansas City Court of Appeals of the State of Missouri.

Motion to Dismiss Writ of Error, or Affirm Judgment, or Transfer to the Summary Docket, with Statement and Argument of Defendant in Error in Support Thereof.

No. ———.

Motion to Dismiss Writ of Error, or Affirm Judgment, or Transfer to the Summary Docket.

And now comes defendant in error, by her attorney of record herein, and moves this Honorable Court,

First: To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no federal question being involved therein, especially none which can affect the rights of plaintiff in error; or,

Second: To affirm the judgment and decision of the Kansas City Court of Appeals of the State of Missouri, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions on which the decision of this case depends are so frivolous as not to need further argument; or,

Third: To transfer this cause for hearing to the summary docekt, if this court should refuse to dismiss or affirm, because the case is of such a character as not to justify extended argument; and that additional damages be assessed and awarded defendant in error, as for delay, etc.

J. G. L. HARVEY,
Attorney for Defendant in Error.

In the Supreme Court of the United States.
October Term, 1915.

The Chicago, Burlington & Quincy Railroad Company, a corporation, Plaintiff in Error.
vs. No. ———.
Margaret Harrington, Defendant in Error.

Notice of Motion.

To Messrs. William Warner, Oliver H. Dean, William D. McLeod and H. M. Langworthy, Attorneys for Plaintiff in Error:—

You are hereby notified that on Monday, April 17th, 1916, at the opening of court on that date, I shall make and present before said Supreme Court of the United States, a motion on behalf of defendant in error, first, to dismiss the writ of error herein, on the ground that the Supreme Court of the United States has not jurisdiction thereof, no federal question being involved therein, especially none which can affect the rights of plaintiff in error; or second, to affirm the judgment and decision of the Kansas City Court of Appeals of the State of Missouri, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions on which the decision of this case depends are so frivolous as not to need further argument; or, third, to transfer this cause for hearing to the summary docket, if the court should refuse to dismiss or affirm, because the case is of such a character as not to justify extended argument; and that additional damages be assessed and

awarded defendant in error, as for delay, etc.; and that I shall file, in support of said motion, a printed statement and argument, a copy of which is hereto attached and delivered to you.

Dated at Kansas City, Missouri, this 23rd day of March, 1916.

J. G. L. HARVEY,
Attorney for Defendant in Error.

Received a copy of the foregoing notice, and the motion, statement and argument therein referred to this 23rd day of March, 1916.

WILLIAM WARNER,
OLIVER H. DEAN,
WILLIAM D. MCLEOD,
H. M. LANGWORTHY,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.
October Term, 1915.
The Chicago, Burlington & Quincy Railroad Company, a corporation, Plaintiff in Error,
vs. No. ————
Margaret Harrington, Defendant in Error.

Writ of Error to the Kansas City Court of Appeals of the State of Missouri.

STATEMENT.

This suit was brought by defendant in error against the plaintiff in error under the laws of the State of Missouri to recover damages on account of the death of her husband, Patrick Harrington, who was killed while working as a switchman for plaintiff in error at Kansas City, Missouri, on or about December 11th, 1909, and through the negligence of plaintiff in error. At the time of his death, deceased, Patrick Harrington, was a member of a switching crew engaged in switching three loaded cars of coal to an elevated coal shed in the yards of plaintiff in error. Owing to the defects in the engine the engineer was unable to stop the loaded coal cars at the required place and the end of the train ran beyond the coal shed and collided violently with a car of sand standing on the track. The deceased was riding on the end of an empty car just back of the third car of coal. When the collision occurred he was thrown from his position on said car and run over by the wheels and instantly killed. The evidence introduced by defendant in error showed

that the collision aforesaid was caused by the negligent acts of plaintiff in error, and that the said negligent acts were the proximate cause of the death of the deceased.

The suit resulted in a judgment in favor of defendant in error against plaintiff in error in the sum of $7,500.00, which judgment was affirmed by the Kansas City Court of Appeals and a writ of certiorari was denied by the Supreme Court of the State of Missouri, and the case was brought to this court by a writ of error, which was ordered by the Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

Plaintiff in error invokes the jurisdiction of this Court upon the ground that it especially set up or claimed a right, privilege or immunity under the Federal Employers' Liability Act, and that the decision of the state court was against such right, privilege or immunity. The following opinion rendered by the Kansas City Court of Appeals (reported in 180 Southwestern Reporter, p. 443), contains a full statement of the case, and of the questions involved.

Harrington v. *Chicago, B. & Q. R. Co.*

Mr. Justice Johnson delivered the opinion of the court:

> Plaintiff sued under the statutes of this State to recover damages for the death of her husband which she alleges was caused by negligence of defendant. At the time of his death, which occurred before seven o'clock in the morning of December 11, 1909, the hus-

band of the plaintiff was employed as a switchman in defendant's yards in Kansas City and was a member of a crew engaged in switching three loaded cars to an elevated coal shed in the yards. The track ran up on a trestle into, through and about one hundred feet beyond the coal shed and the cars were to be left in the shed for unloading into bins. The train included a number of cars, the three loaded cars being in front as the train was pushed up the incline. The first attempt of the engineer to push the cars into the shed was unsuccessful and he pulled the train back, took a fresh start and came on the second time at higher speed. Owing to defects in the engine he was unable to stop at the required place and the front end of the train ran through and beyond the shed and collided violently with a car of sand standing on the track. Harrington was riding on the end of an empty car just back of the third car of coal. When the collision occurred he was fifteen or twenty feet inside the shed. In response to a signal from the foreman the engineer pulled ahead until the loaded cars were moved back into the shed, then a workman uncoupled the loaded cars and the remainder of the train proceeded. Immediately afterward the body of Harrington was discovered on the track at a point about six feet outside the shed, or twenty or twenty-five feet from where he was at the time of the collision. Evidence introduced by plaintiff tends to show that the collision was caused by one or more of the negligent acts pleaded in the petition but counsel for defendant contend that plaintiff has failed to show that such negligence was the proximate cause of the death of her husband. Their theory is that the proof is more consistent with the inference that Har-

rington accidentally fell from the train at the point where his body was found than with the contention of plaintiff that he fell in consequence of the collision and was dragged along the track by the retreating train. The case was here on a former appeal of defendant from a judgment recovered by plaintiff in the Circuit Court and we held the evidence insufficient to show a causal connection between the collision and the injury. (163 Mo. App. 194.) Speaking through Broaddus, P. J., we said: "The undisturbed condition of the clothing of the deceased man and the absence of mutilation of his body, other than where it lay across the track, show beyond all reasonable doubt that deceased fell from the car at or near the place where his body was found, and that he was not jarred from his position by the force of said collision." We reversed the judgment and remanded the cause for another trial.

At the second trial the evidence relating to the cause of the injury was the same as that before us on the first appeal, with the following important additions: Plaintiff introduced witnesses who testified to conditions of the body and clothing of the deceased which would strongly support the conclusion that the body had been dragged along the track. The coroner testified: "The right arm was crushed, from the elbow to the shoulder; the skull was crushed, the brains oozing from the external auditory meatus, that is the outer part of the ear. The ear was torn off. The eight upper ribs on the right side, and seven upper on the left were broken, and the ends driven into the lungs. The diaphragm was ruptured. The abdominal cavity is down below (illustrating); and the upper cavity (illustrating) is the part of the chest cavity

where the lungs and heart are contained. The liver and left kidney were also torn to pieces. the cause of death could have been any of those causes, but I think it 'basia fracture of the skull.' "

The undertaker who prepared the body for burial testified:

"Q. You may describe to the jury the condition you found that clothing in at the time? A. Well, it has been a good while ago, but the best of my knowledge, the body was taken in there, and I ordered the clothing taken off—as is the custom—and had the body embalmed and fixed up. The clothes was all cinders and grit, and the face was bruised up and embedded with cinders, and one side of his face was what we call scuffed, and when we got the clothing off, they were all full of cinders. The clothing was full of cinders all over. And he was what we call crushed—the body was crushed—from some cause—I don't know what the cause was.

"Q. These cuts and tears you saw on the clothing. Now where were most of those cuts and tears? Were they confined to the upper part—where were those cuts? A. All that clothing was what we call mutilated, or crushed into the body, and there were cinders on his face also, and this clothing was taken off and put aside, and whenever the people wished it we have a salamander and burn them—if they don't take them—whatever is the wish of the family.

"Q. These cinders in this clothing and embedded in the body—what kind of cinders were they? A. They looked like coal cinders. And we took the body and washed it all off, and embalmed the body and got those out."

Other witnesses corroborate the testimony of the coroner and undertaker as to the crushed and mutilated state of the body and the abraded and dust-imbedded condition of the skin. Coal was being constantly loaded in the shed and the track, of course, was covered with coal dust. Counsel for defendant lay much stress on the omission of the evidence of plaintiff to show that the alleged dragging of the body left a trail in the dust or bespattered the track with blood and argue that the alleged causal relation between the pleaded negligence and the fatal injury is still left by the evidence of plaintiff in the field of conjecture and speculation. We do not accept this view, but to the contrary find that plaintiff has filled the lacuna which appeared in the evidence on the former appeal and which prompted us to hold that she had failed to sustain her burden of proof.

Plaintiff was not required to prove her case by direct and positive evidence. Her evidence relating to the proximate cause of her husband's death is circumstantial but if its acceptance would lead to a reasonable inference that his fall from the train was the direct result of the violent collision, she should be held to have removed the question of proximate cause from the sphere of conjecture, and to have made it a debatable issue of fact for the jury to solve. The facts and circumstances adduced by plaintiff are inconsistent with the theory that Harrington accidentally fell from the train at the point where his body was found and on reasonable analysis are consistent with no other inference than that urged by plaintiff, viz., that he was thrown from his position on the car by the violent impact of the collision. We must begin with the presumption that he was

exercising due care and that no fault of his caused, or contributed to, his fatal injury. "The presumption of due care always obtains in favor of a plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another." (*Buesching* v. *Gaslight Co.*, 73 Mo. l. c. 233; *Riska* v. *Railroad*, 180 Mo. 168; *Stotler* v. *Railway*, 200 Mo. l. c. 146.)

He was an experienced brakeman, accustomed to riding on freight cars while they were being switched and there was nothing unusual in the movement of the car on which he had been riding when it left the place where his body was found—nothing to have caused an experienced and reasonably careful brakeman to fall from the car. On the other hand, the sudden and unusually violent collision of the train with the sand car, occurring as it did in the darkness and under circumstances which show that it was not anticipated by the brakeman, presents itself as the only natural and reasonable cause of his fall and death. And when we add to this fact the further facts that it was a probable and natural consequence of his fall for his body to be caught by low-hanging parts of the car from which he fell and be rolled or dragged along the track, and that his body and clothing showed signs of having been thus dragged, we have before us a complete causal chain between the pleaded negligence and the fatal injury. The probative strength of this evidentiary chain is not greatly weakened by the omission of proof relating to marks on the track left by the dragging of the body. Proof of the absence of blood stains would not have been a conclusive circumstance against the contention of plaintiff since the injuries do not appear to have been

of a nature to cause the shedding of much blood, and the body was encased in heavy clothing. The answer to the argument relating to the failure of plaintiff to prove that the dragging left a trail in the dust on the track is that the coal shed was a place of ceaseless activity; cars of coal were being unloaded day and night, the death of Harrington caused no cessation in the work and falling dust must have obliterated all traces of the injury in a few hours. To hold plaintiff was remiss in not producing evidence of a condition so ephemeral would be to impose an unreasonable burden upon her. Our conclusion is that she made a case to go to the jury, that the court did not err in overruling the demurrer to the evidence, and that the judgment recovered by plaintiff should be allowed to stand, unless we should find that a new defense interposed at the last trial is well grounded.

An amended answer was filed in which it is alleged: "That at all the times referred to in said petition, this defendant was, ever since has been and now is, a common carrier by railroad, engaged in interstate commerce between and through several of the states; that at the time of the accident resulting in the death of said Patrick Harrington, the train upon which the said Patrick Harrington was employed and was working was engaged in interstate commerce, and the said Patrick Harrington was employed by this defendant in such commerce; that the liability of this defendant, if any, on account of or because of the death of said Harrington, was and is regulated and controlled solely by the Act of Congress, entitled 'An Act Relating to the Liability of Common Carriers by Railroad, to their Employees, in Certain Cases,' ap-

proved April 22nd, 1908 (35 Stat. at Large, p. 65, Chap. 149; U. S. Comp. Stat. Supp. 1909, p. 1171), and by the Amendment to said Act, approved April 5th, 1910 (36 Stat. at Large, p. 291, Chap. 143), and said liability, if any, was not and is not controlled or regulated by the common law, nor by any statute of the State of Missouri, under and by virtue of which the plaintiff seeks to recover, for the reason that said common law and statutes of the State of Missouri have been superseded, suspended and rendered inoperative by said Acts of Congress in cases where employees of common carriers by railroad engaging in interstate commerce suffer injury while employed in such commerce, or in case of the death of such employee; and this defendant is therefore not liable to plaintiff by reason of the matters and things alleged and set up in the plaintiff's said amended petition; and plaintiff is not the proper party to maintain or prosecute this action, and cannot recover anything of and from this defendant or prosecute this action, and cannot recover anything of and from this defendant herein."

The proof relating to the issue thus raised is as follows: Defendant owns and operates a system of railroads covering this and a number of other western states and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars used in both kinds of traffic are received, sent out, cared for and repaired in the yards. The switching crew of which Harrington was a member did not

work outside of this state and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic.

It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this state which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce. We think it could not be denied that a locomotive which was run to the shed to receive coal from one of the chutes preparatory to hauling a local train engaged only in intrastate business should be regarded as being employed in an act and as an instrumentality of intrastate commerce and as not being being at that time in any sense an instrumentality of interstate commerce.

The position of counsel for defendant is that in being moved to the shed where a large and, indeed, the major part of it would be supplied to locomotives engaged at the time or about to be engaged in interstate commerce, the coal had become impressed with the character of an instrumentality of such commerce, and the death of Harrington, if caused by negligence of defendant, created a cause of action under the Federal Employers' Liability Act of 1908, and the subsequent amendment thereto, which, by the terms of the Act inured, not to plaintiff, the widow, but to

the administrator of Harrington's estate, for the benefit of his widow and children, and that such cause is exclusive of any which, but for the Federal Law, would have arisen under the laws of this state, in favor of the widow alone.

In the first Employers' Liability case (207 U. S. 463) the Supreme Court of the United States found that in the Act of 1906, Congress had exceeded its legitimate powers for the reason that it assumed to deal with conduct and to create rights and remedies which had no direct bearing on, or reference to, the transaction of interstate commerce. The opinion says of that act, "it deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce * * * . Thus the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employes of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow-servant, by whose negligence the injury or death may have been

occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from the negligence of any of its officers, agents or employes." The substance of the opinion, of present moment, is that Congress has no power to deal with the relation of master and servant except where the service is being rendered in the transaction of interstate commerce.

The second Act of 1908 was designed to avoid this fatal defect of the first. It was entitled "An Act Relating to the Liability of Common Carriers by Railroad to the Employes *in Certain Cases* (italics ours), and provided that "every common carrier by railroad while engaged in commerce between any of the several state or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of death of such employe to his or her personal representative for the benefit of the surviving widow or husband and children of such employe for such injury or death, resulting in whole or in part from the negligence of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." This act, being free from the objectionable features of the first, was sustained by the Supreme Court as a proper exercise of the legislative powers of the Federal Government (Second Employers' Liability Cases, 223 U. S. 1), on the ground succinctly stated in this sentence in the opinion; "The present Act, unlike the one condemned in Employers' Liability Cases, 207 U. S. 463, deals only with the

liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce."

From the history of the legislation in question and the judicial definitions of the powers of Congress to deal with the subject of interstate commerce which we have thus brifly reviewed, it is apparent that the scope of the second Act was intended to be restricted to instances where the work being done at the time of the injury of the employe was concerned directly and not indirectly with the transaction of interstate commerce and in the solution of the question of whether the work in which the employe was engaged when injured was or was not of a character to fall within the purview of the statute, the true test is not whether the work was an essential part of the activities of an interstate carrier, the non-performance of which might or would delay and hinder the proper transaction of its interstate business, but was it a part of the interstate commerce transacted by the carrier? If mere hindrance to the performance of interstate transportation were the only test it would be difficult to conceive of an instance of which it could not be said that the injury to the employe was not in some degree, and to some extent, an interruption of such commerce. Carriers of interstate commerce, as a rule, to which we know no exception, are also carriers of intrastate commerce and the interdependence of the two classes of traffic is so complete that an interruption of the work pertaining to one necessarily would result in some measure to delay the work of the other. No doubt the switch engine and crew after the coal cars had been left in the shed would have returned to the yards and in all probability proceeded to switch cars

employed in interstate traffic. The death of Harrington unquestionably delayed the performance of such work, yet it could not be said that for that reason he and defendant should be held to have been engaged in interstate commerce at the time of his death.

In *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473, the fireman of a switching crew was killed while freight cars loaded with intrastate freight were being moved in terminal yards where both interstate and intrastate commerce were carried on indiscriminately. The District Court for the Eastern District of Louisiana held that the decedent was engaged in interstate commerce, saying, in part, "I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status and fixed the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable and where the employe himself has no control over his actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them." (*Behrens* v. *Railroad,* 192 Fed. Rep. 581.)

But that conclusion was rejected by the Supreme Court and following the reasoning of the two Employers' Liability Cases the court held that the service of the employe "was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected,

upon the completion of that task to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

This view of the statute and of the extent of the power of Congress to deal with the subject of interstate commerce it implies has been pronounced by the Supreme Court in every decision construing or applying the statute from the first Employers' Liability Cases to the Behrens case, and we think it must be conceded that if the cars being switched by the crew of which Harrington was a member were carrying intrastate freight, as in the Behrens case, the cause of action created by the pleaded negligence did not fall within the operation of the Federal statute and the suit was properly brought by the widow under the state laws.

The most difficult task confronting us is the solution of the question of whether or not the coal being transported had become impressed with the character of an instrumentality of interstate commerce for the reason that an indefinite and indistinguished part of it certainly would be used as fuel for locomotives engaged in interstate traffic, though the remainder just as certainly would be supplied to locomotives engaged only in intrastate traffic. There would be no separation of the fuel and no application of any portion to the use of either class of traffic before such portion passed from the bin or chute at which the engine happened to stop, into the tender of the engine and it is manifest that the act of filling the tender of an intrastate engine could not be classified as an act of intrastate transportation nor could

the coal thus used which, as stated, would be drawn from the carriers' general store, be regarded as ever having been an instrumentality of intrastate commerce. And if it had not been thus characterized how may it be said that the general supply of which it had been a component but indistinguished part had taken on the character of an instrumentality of interstate commerce? Defendant procured coal from mines in this State, hauled it to its storage track where it remained until needed to replenish the coal chutes. Interstate trains could not be run without coal, nor could defendant continue any of its activities as a common carrier if it were unable to procure that indispensable commodity. The definition of an instrumentality of interstate commerce, pressed by counsel for defendant, if carried to its logical end would place unmined coal in the category of such instrumentalities. Asked on oral argument to state at what point he thought this coal became such an instrumentality counsel answered, "when the loaded cars arrived at Kansas City and were placed on the storage track."

What was there in that act to work such a metamorphosis? If the coal on storage had that character it had the same character during its transportation from the mines to the storage track, since it was just as essential to the transaction of interstate commerce while it was being moved to replenish the general store as it was thereafter on the storage track or in the coal shed. The act which imparts to fuel the character of an instrumentality of interstate commerce is the act of applying it to the immediate uses of such commerce as distinguished it from acts which merely have

an indirect or remote effect upon the transaction of such commerce.

In *Pederson* v. *Railroad,* 229 U. S. 146, the decedent was employed in repairing a bridge on a railroad used in both interstate and intrastate commerce and while carrying bolts from a tool car to the bridge for use in the repairs, was struck and killed by a passing train. The Supreme Court held that he was engaged at the time in interstate commerce for the reason that the maintenance of the track, bridges and roadbed of an interstate railroad is a work "so closely related to such commerce as to be in practice and contemplation a part of it." Care was observed in the opinion to restrict the scope of the statute as in the two Employers' Liability cases and as it is restricted in the later decision in the Behrens case. "The true test always is," say the court, "Is the work in question a part of the interstate commerce in which the carrier is engaged * * * was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected with it as to be a part of it?"

Manifestly the conclusion that Pederson was performing a work of interstate commerce when he was carrying bolts from the tool car to the bridge proceeded from the view that these bolts had been withdrawn from the general store and applied to a specific use of such commerce, just as coal in one of the chutes would be so applied when it was being passed from the chute to the tender of an interstate engine. Before these bolts were taken from the company's store room and placed on the tool car for the specific purpose of being used in the repair of the bridge the work of procuring and stor-

ing them was not work "so closely connected with interstate commerce as to be a part of it." The additional act of setting them apart to the specific use of repairing the bridge was treated by the court as the determinative, definitive act.

The close analogy between that case and the one in hand is apparent. As with the bolts in the store room, so with the coal in question: as long as it remained a general store or source of supply and until it became necessary to draw upon it for fuel to supply an engine engaged in interstate commerce, the work of handling and moving it could not be considered as being so closely connected with interstate commerce as to be a part of it.

There is a vital distinction overlooked in the case of *Barlow* v. *Railroad*, 143 N. Y. Supp. 1053, between tracks, bridges and roadbed and such divisible things as fuel and supplies of various kinds. The very fact that there could be no separation or division of a permanent utility, such as a railroad, led to the conclusion in the Pederson case that the continuous interstate use of such utility and its structural parts would suffice to give them the stamp of instrumentalities of interstate commerce. But where there may be and will be a separation and various specific applications of a mass of supplies, such as fuel, the controlling reason for the classification of a bridge in use as an instrumentality of interstate commerce is the controlling reason for classifying such divisible, but undivided, supplies as property which has not become so closely related to interstate commerce as to be a part of it. That it is the direct application of the thing to the particular use that determines the character of the thing is point-

edly suggested in the intimation in the Pederson case that if the bridge had been in process of original construction and not of repair it would not have been regarded as an instrumentality of interstate commerce, though it goes without saying that the construction of a railroad is as necessary to interstate transportation by rail as the procurement and storing of fuel to make steam for the engine. The court say that the only concern of the statute in its relation "to tracks, bridges, engines or cars," is "with the work of maintaining them in proper condition after they have become such instrumentality *and during their use as such.*"

The only concern the statute can have with the subject of handling and storing the carrier's general supply of coal is with the work of separation and handling such portions as may be withdrawn from the general store for the immediate use in transportation of interstate commerce.

No useful purpose would be served in reviewing the numerous authorities cited in the briefs. The controlling authorities are the two Employers' Liability cases and the Behrens and Pederson cases. As we understand these decisions they are in perfect accord and the rules they announce and apply compel the conclusion in the instant case that Harrington was not engaged in interstate commerce at the time of his injury and death.

The case does not fall within the operation of the Employers' Liability Act and is controlled by the laws of this State in force at the time of the injury.

Complaint is made of the refusal of the court to discharge the jury on a motion of defendant based on an alleged improper question asked by one of the jurors. We dispose

of this point with the statement that we perceive no impropriety in the question itself and find nothing in the record to support the assertion that the juror exhibited hostility towards counsel for defendant. The further point that counsel for plaintiff indulged in improper argument was not preserved in the record and therefore cannot be considered.

The judgment is affirmed. Trimble J., concurs in separate opinion; Ellison P. J., dissents and files separate opinion.

J. M. JOHNSON.

In the Kansas City Court of Appeals, March Term, 1915. Margaret Harrington, Respondent, vs. Chicago, Burlington & Quincy Railroad Company, Appellant. No. 10775.

APPEAL FROM THE JACKSON CIRCUIT COURT.

CONCURRING OPINION.

The question whether or not the evidence discloses a case under the Federal Employer's Liability Act depends upon what the deceased employe was doing at the very time he was killed, that is, whether or not he was, at that time, engaged in interstate commerce. He was killed while assisting in the transportation of coal from defendant's mine to its storehouse, all within this state. Hence the question whether he was engaged in interstate commerce or not depends upon whether the coal he was then helping to transport was so intimately and indissolubly connected with interstate commerce as that it must be regarded as an instrumentality thereof notwithstanding the fact that it had not yet reached

defendant's storehouse and had neither been separated from defendant's general supply of coal nor appropriated to any department of defendant's business whether intrastate or interstate. In other words, was this unseparated and unappropriated coal and the work of putting it in defendant's storehouse "so closely related to" interstate commerce as to be "in practice and contemplation a part of it?" (*Pederson* v. *Delaware, etc. R. Co.*, 229 U. S. 146, l. c. 151.) Not whether a supply of coal, a part of which would be used in interstate commerce *after* it had been set apart and appropriated for that purpose, was antecedently necessary to the defendant's business as a carrier, but whether such supply, and the work of storing it where it would be convenient, is so directly and intimately connected with the business of interstate commerce as to render it impossible to regard it as anything other than an indivisible branch thereof. As said in the major opinion, it is not the *indirect* effect upon interstate commerce that determines the question, else there would be little use of limiting the Federal Act to those cases wherein the work was *directly* connected with interstate commerce. For, if the putting of coal into the storehouse be deemed interstate commerce, where is the line of demarcation to be placed? And when does the work change from its ordinary character into that interstate commerce? When does the coal become an "instrumentality" of *interstate* commerce? At the mines? On the way therefrom? In the storehouse? Or does that portion only of such coal become *an instrumentality* of *interstate* commerce when it is separated, or is being separated, from the general store for the purpose of devoting it to that commerce? It would seem that the

coal would not become an instrumentality of such commerce until that time; and, therefore, the general work of putting coal into defendant's general storehouse should not be considered as an engagement in interstate commerce. This does not require that before anything can be considered an instrument of interstate commerce it must be used exclusively in the prosecution thereof. The coal in this case is something that can be *separated* therefrom. It is not like a bridge or the track in the roadbed, or a round house used in the repair of both interstate and intrastate engines. For these do not lose their status as interstate instrumentalities when used in intrastate business. Hence they cannot be separated therefrom and must therefore be regarded as indivisible parts thereof. But even as to these they are not considered as instruments of interstate commerce *until they have been devoted thereto.* The United States Supreme Court in the Pederson case, *supra,* at page 152 (where the employe was carrying materials which had been separated from the carrier's general store and appropriated to the repair of a *bridge,*) say they are not dealing with the construction of tracks, bridges, engines, or cars "which have not *as yet* become instrumentalities in such commerce, but only with the work of maintaining them in proper condition *after they have become* such instrumentalities and *during their use* as such" (italics ours). Had the coal in this case, which had not as yet reached defendant's storehouse, been devoted to interstate commerce? If the employe in this case had been killed while loading coal from the storehouse into an intrastate engine, he could hardly be said to have been engaged in interstate commerce. Why? Because the coal thus han-

dled, not having been *as yet* devoted to interstate commerce, was not an instrumentality thereof, and the work of filling an intrastate engine was not a part of interstate commerce. What is it that determines the character of the instrumentality the coal in the storehouse will become? Is it not the act of separating it from the general store and appropriating it for actual use together with the nature of the business to be furthered by that act? But, it may be said, the work of putting the coal into the storehouse is a furtherance of interstate commerce since some of it at least will be used therein. But that business is not furthered until the coal is appropriated from the storehouse for that purpose. Putting coal into the storehouse may be necessary to be done *before* the carrier can engage in the interstate business, or *in order* that it may do so, just as the original *construction* of a roadbed and bridge may be necessary, but it is not *engaging* in interstate commerce. It may indirectly affect interstate commerce just as the breaking down of an intrastate train on the line may affect interstate business, but it is not an *engaging therein* since there remains something else to be done, namely, the appropriation and devotion of the coal to interstate traffic before it becomes an instrumentality thereof or the employe handling the same can be said to be engaged therein. The act of the employee at the time he is injured must be an engagement in interstate commerce, and the reason an employee engaged in repairing a track or bridge on the line of an intrastate and interstate carrier is deemed to be engaged in interstate commerce, is because the track or bridge *has already become* an instrumentality of interstate commerce since it has been devoted to

and used in that business. But the coal which the employe in the case at bar was handling had not yet become such instrumentality since it had not yet reached the point where it had been separated from defendant's general stores and devoted to its interstate business.

The case of *North Carolina etc. R. Co.* v. *Zachery,* 232 U. S. 248, does not seem to me to be in conflict with this view, since there, the train, which the employe was about to take out, was undoubtedly an interstate train, as it contained cars from Virginia destined to Selma, North Carolina, and the injured employee "had already prepared his engine for the purpose" (l. c. 259); that is, the employe, when killed, had entered upon the business of interstate commerce when he began the work of making ready to start out on the trip.

It seems to me that to say the deceased employe, in the case at bar, was engaged in interstate commerce because he was moving coal of which a portion would afterwards and ultimately become an instrumentality of interstate commerce, is to overlook the distinction made in the Behrens case (233 U. S. 473), and go back to the view of the District Court which that case condemned. At pages 477 of the Behrens case the Supreme Court say that doubtless Congress had *power* to regulate the liability of the carrier in cases where there was "a practical difficulty in separating or dividing the general work" of an employe, but that Congress in *exercising the power* did not go that far, but provided that the carrier while engaging in interstate commerce should be liable to any employe only "while he is employed by such carrier in such commerce." On page 478, the court say: "It is clear that Congress *intended to confine its action* to injuries occurring *where* the par-

ticular *service* in which the employe *is engaged is a part* of interstate commerce" (Italics ours).

If, in the progress of obtaining and transporting coal from defendant's mine (all wholly within this state), it is necessary to place a line of demarcation between the place where that work loses its ordinary character and partakes of an interstate nature, then the only place where it can be safely and logically drawn so as not to include every portion of that work but only that which *is a part* of interstate commerce, is at the point where the coal is being separated from the general store and devoted to the purpose of interstate commerce. The employe in the case at bar was killed before the coal reached that line of demarcation, and for that reason I am of the opinion that he was not engaged in interstate commerce at that time and the case is not within the Employers' Liability Act. I, therefore, concur in the affirmance of the judgment.

FRANCIS H. TRIMBLE, J.

In the Kansas City Court of Appeals, March Term, 1915. Margaret Harrington, Respondent vs. Chicago, Burlington & Quincy Railway Company, Appellant. No. 10775.

APPEAL FROM JACKSON CIRCUIT COURT.

DISSENTING OPINION BY ELLISON, P. J.

Plaintiff is the widow of Patrick Harrington an employe of the defendant railway company and bases her action for the death of her husband on the statutes of this state,

which, she alleges, was caused by the negligence of defendant. She recovered judgment in the trial court and defendant appealed.

A case is stated in the petition avowedly under the state statute, and defendant claims the evidence showed a case under the Federal Employers' Liability Act. The latter act supersedes the state statute in all cases where the right of action is covered by that act. In other words, the Federal act is exclusive, *St. L., San Fran. Ry.* v. *Seale*, 229 U. S. 156. We held in *Moliter* v. *Railroad*, 180 Mo. App. 84, that where the case stated in the petition was under the state statute and the proof made a case under the Federal statute there could be no recovery and a demurrer to the evidence should be sustained. Such is the decision of the Supreme Court of the United States in the unreported case of *Toledo, St. L. & W. Railroad* v. *Slavin*, (February, 1915), 35 S. C. Rep. 306. This is the effect of a decision by the Supreme Court in this state in *Thompson* v. *Railroad*, (not yet reported), 171 S. W. 364, and two decisions by the St. Louis Court of Appeals, *Rich* v. *Railroad*, 166 Mo. App. 379, and *Hearst* v. *Railroad*, (not yet reported), 173 S. W. 86.

We are thus brought to the question whether defendant is right in its claim that the evidence showed a case under the Federal statute. If it did, defendant's request for a peremptory instruction should have been granted. It appears that defendant is an interstate railway doing a large business over many states and that it also does business wholly within this state. It has terminal yards and coal bins at Kansas City in this state, into which bins, coal is placed and kept for the supply of its interstate engines, and also for the use of engines performing serv-

ice wholly within this state. These bins were elevated several feet above the ground and were built with chutes from which coal could be run out into the tender of engines standing underneath. In that way defendants' engines were supplied with fuel. An inclined track led up to the level of the bins and cars of coal were pushed or drawn by an engine up this incline, where it would be dumped into the bins.

Three cars of coal, intended for these bins, had been brought into the yards and placed on a storage track, near by, where they had remained for three days. Plaintiff's husband was one of three members of a switch crew in charge of a switch engine in the yards and they were directed to take the cars to the bins to be unloaded. They did so; the engine pushing the cars up the incline. He was last seen sitting on the end of one of the cars. There were some standing cars on the level beyond the bins and it appears the men in immediate charge of the engine pushed his cars up with too much force, running them by the bins and colliding them with the standing cars. The cars were pulled back, the coal cars uncoupled and the engine returned to the yards. Deceased was found on the track dead and his body mutilated. The inference is, that the collision with the standing cars threw him to the track between the cars.

The foregoing embraces, substantially, the facts. Some detail is omitted which is not necessary to state, since we shall assume that defendant's servants were guilty of negligence.

From the foregoing it appears that, at the time of his death, deceased was engaged in placing cars of coal, which was to be used

on both interstate and intrastate engines, where it would be dumped into the bins and thence run through chutes onto these engines. We do not understand it to be disputed that if the coal he was handling had been for the exclusive use of interstate engines, he would have been engaged in interstate commerce; nor do we understand it to be disputed that though the coal was for use of both classes of engines, that an employe letting it run through the chutes into the tender of an interstate engine would, by that act, be engaged in such commerce. But the argument is that as the coal in the bins was a general and undistinguished mass, some to be used in intrastate and some in interstate commerce, it did not become an instrument of either until the act of separation began, by letting it run into the tender of an engine belonging to one of these classes. It seems to me that such view is not in accord with the decision in *North Caro. R. R. Co.* v. *Zachery*, 232 U. S. 248, where an employe was preparing a freight engine in the yards for an interstate trip. The court held that he was engaged in interstate service, "and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant." In other words, the act constituting interstate service is not necessarily the act accomplishing the service.

At any rate, it seems to me that the effect of such argument is to prevent anything being an instrument of interstate commerce unless it is used exclusively in the prosecution of such commerce; the result being a rule in the face of the decisions of the Supreme Court of the United States. If the work being performed by an interstate servant is exclusively intrastate service, then

it does not fall within the terms of the Federal statute, as it now reads: *Ill. Central R. R. C.* v. *Behrens*, 233 U. S. 473. But if the work being performed by such servant is an interstate service, it will not lose its character as such, by reason of its being incidentally also an intrastate service. That is the meaning and effect of *Pederson* v. *Det. Lack. & West. R. R.*, 229 U. S. 146.

I will ask a question here that Mr. Justice Van Devanter asked in the Pederson case (p. 151): Was the work of placing the coal at the bins being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? The justice said, and I repeat, that the answer is obvious. One cannot separate himself from the thought that the deceased was taking coal which had been brought into the yards for interstate fuel, to a bin so that it might be conveniently loaded onto interstate engines; and that the further fact that a part of it would be used for intrastate engines should not blot out the first fact. The rule in the Pederson case has been applied in a number of decisions, both Federal and State.

In New York, a case arose essentially like the one under consideration. The engineer of a switch engine was switching cars loaded with coal so that they could be dumped into the company's bins from which the company's engines, both interstate and intrastate, would coal by use of chutes, and it was held that he was engaged in interstate commerce; *Barlow* v. *Lehigh Valley Co.*, 143 N. Y. Supp. 1053.

There was a case in Washington concerning a railway water tank into which the attendant pumped water for use, indiscrimin-

ately, of interstate and intrastate engines. The attendant was hurt while going to his work at the tank; and it was held that he was engaged in interstate commerce; *Horton* v. *Oregon R. & Nav. Co., 72* Wash. 503.

A servant of a railroad engaged in both classes of commerce was engaged in putting in a new block system along the track, designed to protect both classes of trains. He was held to be engaged in interstate commerce; *Grow* v. *Railroad Co.,* 44 Utah, 160.

An engine used to haul both classes of trains was being repaired in the round house by a servant of the railroad company. It was held that he was in the service of interstate commerce; *Winters* v. *Minn. & St. L. Ry. Co.,* (Supreme Court Minn., July, 1914), 148 N. W. 106.

A servant of a carrier of both interstate and intrastate commerce was engaged in the repair of a freight shed in which both classes were housed; and it was held that he was engaged in the service of interstate commerce; *Eng.* v. *Southern Pac. Ry. Co.,* 210 Fed. 92.

The foregoing considerations show, that while stating a case under the state statute, plaintiff has proven one under the Federal statute. "In short, the case pleaded was not proved and the case proved was not pleaded." *St. L. & San Fran. Ry. Co.* v. *Seale,* 229 U. S. l. c. 161. There is no ground for amendment; *Moliter* v. *Railroad,* 180 Mo. App. 84. I think we should reverse the judgment, and therefore dissent from the majority opinion.

JAMES ELLISON, P. J.

State of Missouri—Sct.

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, do hereby certify that the

foregoing is a true copy of the opinion of said court, delivered in the foregoing entitled cause on July 2nd, 1915, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Kansas City Court of Appeals. Done at office in Kansas City, State aforesaid, December 2, 1915.

(Seal)

L. F. McCoy, *Clerk*
Kansas City Court of Appeals.

ARGUMENT.

Plaintiff in error's assignment of errors filed in this court contains fourteen assignments of alleged error. Its assignments, however, are so general and indefinite that we are unable to determine for a certainty the particular alleged errors upon which it relies. The practice of assigning such a large number of general and indefinite assignments of error has been frequently condemned by this court.

> *Central Vermont Ry. Co.* v. *White, Adms.* 238, U. S. 507.

We shall, however, briefly refer to the questions which we anticipate counsel will seek to raise.

FIRST.

From a careful reading of all of the fourteen assignments of alleged error filed by plaintiff in error herein we apprehend that counsel will claim in this Court that the appellate court of the state erred in two particulars, to-wit: First: **In failing to hold that under the facts as found by the appellate court that Patrick Harrington, the deceased, was engaged in interstate commerce at the time of his death,** and in holding **that the laws of Missouri applied to this case.** Second: In holding **that under the evidence and facts as found by said state court that there was evi-**

dence tending to show that the death of said Patrick Harrington was caused by negligence upon the part of the plaintiff in error.

SECOND.

On a writ of error the Federal Supreme Court does not deal with the facts, but this Court accepts the findings of the appellate court of the state upon matters of fact as conclusive and reviews only questions of Federal law within the jurisdiction conferred upon the Federal Supreme Court.

King v. *West Virginia*, 216 U. S. 92.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86, l. c. 97.
Chrisman v. *Miller*, 197 U. S. 313, l. c. 319.
Chicago, Burlington & Quincy Rd. v. *Chicago*, 166 U. S. 226.
M. K. & T. Rd. Co. v. *Haber*, 169 U. S. 613.
Southern Ry. Co. v. *Carson*, 194 U. S. 136-140.
3rd Edition Foster on Fed. Prac., 5th Ed. p. 2396.

Consequently we will consider this case in the light of the facts as found by the appellate court of the State of Missouri, and not as the facts set out by plaintiff in errror in the third assignment of alleged error filed by plaintiff in error in this court.

THIRD.

It will be observed the Kansas City Court of Appeals of Missouri said:

> "Defendant (plaintiff in error) owns and operates a system of railroads covering this and any number of other western states, and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri, and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars used in both kinds of traffic are received, sent out, cared for and repaired in the yards. The switching crew of which Harrington was a member did not work outside this state, and was engaged, at the time of his death, in switching coal belonging to defendant (plaintiff in error), and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic. * * * Defendant (plaintiff in error) operated local trains from Kansas City to terminal points in this state, which carried only intrastate commerce."

The court further said:

> "Defendant (plaintiff in error), procured coal from mines in this state and hauled it to its storage track, where it remained until needed to replenish the coal chutes."

In concurring opinion of Trimble, J., the court said:

> "He (Patrick Harrington) was killed while assisting in the transportation of coal from defendant's mine to its store house, all within this state (Missouri). * * * If, in the process of obtaining and transporting coal from defendant's mine (all wholly within this state) it is necessary to place a line of demarcation between the place where that work loses its ordinary character and partakes of an interstate nature, then the only place where it can be safely and logically drawn so as not to include every portion of that work and only that which is a part of interstate commerce, is at the point where the coal is being separated from the general store and devoted to the purpose of interstate commerce. The employe (Patrick Harrington) in the case at bar was killed before the coal reached that line of demarcation."

In dissenting opinion filed by Ellison, Presiding Judge, in the case at bar, he said:

> "From the foregoing it appears, that at the time of his death, deceased was engaged in placing cars of coal which was to be used on both interstate and intrastate engines, where it would be dumped into the bins, and thence run through chutes onto these engines."

FOURTH.

An employe engaged in switching company coal from the company's storage track to its warehouse, especially when said coal came from the railway company's mine, all within the State of Missouri, is not engaged in interstate commerce

within the purview of the Federal Employers' Liability Act of April 22, 1908, and amendments thereto of 1910.

Ill. Cent. Rd. Co. v. *Behrens,* 233 U. S. 473.
Pederson v. *Del. Lack. & Western Rd.,* 229 U. S. 146.
Howard v. *Ry.* (First Emp. Liability cases), 207 U. S. 463.
Mondou v. *Ry.* (Second Emp. Liability cases), 223 U. S. 1.
Del. Lack. & Western Ry. v. *Yurkonis,* 238 U. S. 439.
Shanks v. *Del. Lack. & Western Ry. Co.,* 36 Sup. Ct. Rep. 188.

In the case of *Pederson* v. *Delaware, Lackawanna & Western Railroad Company, supra,* the court said:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In the case of *Illinois Central Railroad Company* v. *Behrens, supra,* the court said:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Was that work being done independently of the

interstate commerce in which the defendant was engaged or was it so closely connected therewith as to be a part of it?"

The court further said:

"It is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce."

In the case of *Delaware, Lackawanna & Western Railroad Company* v. *Yurkonis, supra,* the court said:

"The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce. Facts essential to recovery under the Federal Employers' Liability Act."

In the case of *Shanks* v. *Delaware, Lackawanna & Western Railroad Company, supra,* the court said:

"The question for decision is: Was Shanks at the time of the injury employed in interstate commerce within the meaning of the

Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered. Having in mind the natural and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act we think it speaks of interstate commerce not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is: Was the employe, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? * * * Coming to apply the test to the case in hand it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a road bed, bridge, engine, car or other instrument, then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and the interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged like that of the coal miner in the Yurkonis case, is too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

In the Pederson case, *supra,* the bridges which were being repaired were being regularly used in both interstate and intrastate commerce. In other words, the bridges by their use had been dedicated to interstate commerce, while in the case at bar the coal had not been dedicated to any use whatsoever. It was simply being transported from the railroad's mines to the storehouse where it was to be stored until it was needed for use on the engines of the Company, some of which would at some time in the future be used in interstate commerce and some of which would be used in intrastate commerce. If the contention of plaintiff in error is right, and the coal in question at the time it was being placed in the storehouse had already been dedicated to interstate commerce and was an instrumentality of interstate commerce, then suppose a fireman on an engine which was being prepared for a run between two points in Missouri and to pull a train loaded with nothing except intrastate freight was being coaled from the chutes leading from the storehouse, and the fireman on said intrastate engine would be injured while coaling said engine for said intrastate duty, then the fireman, although engaged in nothing except intrastate commerce, would be engaged in interstate commerce because he was handling coal which had already been dedicated to interstate commerce, and which was an instrumentality of interstate commerce. Certainly this cannot be the law, but if the contention of plaintiff in error is correct, then the fireman on the interstate engine while coaling his engine from this coal in the storehouse which had become an instrumentality of interstate com-

merce would be engaged in interstate commerce, although in reality he had nothing whatsoever to do with interstate commerce.

This court in the Pederson case, *supra,* recognized the soundness of this argument of defendant in error when the court said:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In the case at bar the coal had not become an instrumentality of interstate commerce and would not become an instrumentality of interstate commerce until said coal had been dedicated to interstate transportation use.

If the contention of plaintiff in error is correct, and the transportation of the coal in the case at bar was an engagement in interstate commerce, then it would have been an engagement in interstate commerce at any place along the line from the mines to the terminal yards of the Company, and would have been an engagement in interstate commerce when it was being mined by the Company in their own mines for use on their engines.

This court in the case of *Delaware, Lackawanna & Western Ry. Co.* v. *Yurkonis, supra,* specifically held that an employe of a railroad company engaged in mining coal, and that coal to be used by the railroad company in interstate commerce, was not engaged in interstate commerce while mining

said coal. Consequently, defendant in error respectfully submits to the court that said coal would not become an instrumentality after being mined until after said coal had been transported to its destination by the railroad company, and had been set apart and dedicated to the use of interstate transportation. Just as in the Pederson case, *supra,* the bolts while in the storehouse had not been dedicated to interstate commerce, but when the injured employe withdrew these bolts from the general stock in the storehouse and started to the interstate bridge with the bolts, then the bolts were dedicated to interstate commerce.

Just as in the case at bar, if the deceased had been killed while withdrawing coal from the storehouse to coal engines engaged in interstate transportation, then he would have been engaged in interstate commerce, but defendant in error respectfully submits to this court that the coal while being placed in the storehouse, to thereafter remain until it was needed for use, is not analogous to the facts in the Pederson case, wherein the employe had already withdrawn the bolts from the general stock in the storehouse, and was on his way to use said bolts in interstate commerce work exclusively at the time of his injury.

In the case of *Shanks* v. *Delaware, Lackawanna & Western Railroad Company, supra,* the deceased was not engaged in handling an instrumentality, *then in use in interstate commerce or transportation.* He was engaged in handling a commodity which had not yet been placed in use in interstate transportation, and, as in the Shanks case, the connection between the coal at the time of the

death of deceased and the interstate transportation was remote at best, for the only function of the coal was that some of it would at some time in the future probably be used in engines engaged in interstate commerce, and some of it would be used in engines in intrastate commerce at some time in the future.

In the Yurkonis case, *supra*, the coal miner alleged that he was engaged in interstate commerce while mining the coal, and the railroad company admitted that they were engaged in interstate commerce at the time the coal was being mined, and this court held where the plaintiff claimed the Federal Act applied and where the defendant admitted that the Federal Act applies that it was not an engagement in interstate commerce within the purview of the Federal Liability Act.

In the light of the foregoing cases decided by this court, defendant in error respectfully submits that the deceased was not at the time of his death engaged in interstate commerce, and that the laws of the State of Missouri applied to this action.

FIFTH.

Nor was the fact that the verdict of the jury in this case was for a lump sum and was not apportioned, error.

This court in the case of *Central Vermont Ry. Co.* v. *Mary Theresa White*, 238 U. S. 507, held that a general verdict for a lump sum for the plaintiff may be returned by the jury without apportioning the damages between the beneficiaries.

SIXTH.

The contention, if made by counsel for plaintiff in error, that there was no evidence tending to show that the death of Patrick Harrington was caused by the negligence of plaintiff in error, is rebutted by the finding of the Appellate Court of the State of Missouri as follows, viz: "the first attempt of the engineer to push the cars into the coal shed was unsuccessful, and he pulled back up the track and took a fresh start and came on the second time at a higher speed. *That owing to defects in the engine,* he was unable to stop the cars at the proper place, and the front end ran through and beyond the shed and collided violently with a car of said standing on the track. The deceased was riding on the end of an empty car just back of the third car of coal. When the collision occurred he was fifteen or twenty feet inside the shed. In response to a signal from the foreman, the engineer pulled ahead until the loaded cars were moved back into the shed, then a workman uncoupled the loaded cars, and the remainder of the train proceeded. Immediately afterward the body of deceased was discovered on the track at a point about six feet outside the shed or twenty or twenty-five feet from where he was at the time of the collision. Evidence introduced by plaintiff tends to show that the collision was caused by one or more of the negligent acts pleaded in the petition, but counsel for the defendant contend that plaintiff has failed to show that such negligence was the proximate cause of the death of her husband. Their theory is that the proof is more con-

sistent with the inference that deceased accidentally fell from the train at a point where his body was found, than that the contention of plaintiff that he fell in consequence of the collision and was dragged along the track by the retreating train. That the witnesses testified to the condition of the body and clothing of the deceased which would strongly support the conclusion that the body had been dragged along the track.

The coroner testified as follows:

> "The right arm was crushed, from the elbow to the shoulder. The skull was crushed, the brains oozing from the external auditory meatus; that is, the outer part of the ear. The ear was torn off. The eight upper ribs on the right side and seven upper on the left were broken, and the ends driven into the lungs. The diaphragm was ruptured. The abdominal cavity is down below (illustrating); and the upper cavity (illustrating) is the part of the chest cavity where the lungs and heart are contained. The liver and left kidney were also torn to pieces. The cause of death could have been any of those causes, but I think it 'basial fracture of the skull.'"

The undertaker who prepared the body for burial testified as follows:

> "Q. You may describe to the jury the condition you found that clothing in at the time? A. Well, it has been a good while ago, but the best of my knowledge, the body was taken in there, and I ordered the clothing taken off—as is the custom—and had the body embalmed and fixed up. The clothes were all cinders and grit, and the face was bruised

up and imbedded with cinders, and one side of his face was what we call scuffed, and when we got the clothing off, they were all full of cinders. The clothing was full of cinders, all over. And he was what we call crushed—the body was crushed—from some cause; I don't know what the cause was.

Q. These cuts and tears you saw on the clothing—now where were most of those cuts and tears? Were they confined to the upper part—where were those cuts? A. All that clothing was what we call mutilated, or crushed into the body, and there were cinders on his face also, and this clothing was taken off and put aside, and whenever the people wished it we have a salamander and burn them—if they don't take them—whatever is the wish of the family.

Q. These cinders in this clothing and imbedded in the body—what kind of cinders were they? A. They looked like coal cinders. And we took the body and washed it all off, and embalmed the body and got those out."

The court further found that other witnesses testified who corroborated the testimony of the coroner and the undertaker as to the crushed and mutilated state of the body and the abraded and dust-imbedded condition of the skin.

The findings of fact by the State Appellate Courts are final.

King v. *West Virginia*, 216 U. S. 92.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86, l. c. 97.
Chrisman v. *Miller*, 197 U. S. 313, l. c. 319.
Chicago, Burlington & Quincy Rd. v. *Chicago*, 166 U. S. 226.

M. K. & T. Rd. Co. v. *Haber,* 169 U. S. 613.
Southern Ry. Co. v. *Carson,* 194 U. S. 136-140.
3rd Edition Foster on Fed. Prac.—5th Ed., p. 2396.

However, we shall briefly call attention to some of the evidence, which abundantly supports the finding of said state appellate court, that the defects in the engine were the proximate cause of the death of deceased.

The record has not yet been printed and under the rulings and practice of this Court plaintiff in error would not ordinarily be called upon to advance money with which to print the record until this cause was closely approaching hearing. We think, however, that parts of the testimony are relevant to an understanding and disposition of this motion. (*Lazarus, Michael & Lazarus* v. *Prentice,* 234 U. S. 263.) These extracts we shall quote from the abstract of the record filed by plaintiff in error in the appellate court of Missouri.

James Beale, a witness on the part of plaintiff, testified as follows:

> "Q. And what were you doing—what work were you doing at that time? A. I was what they called the head machinist there. (p. 32, Abst.)
> Q. At the place? A. Yes, sir.
> Q. At the roundhouse of the Burlington? A. Yes, sir.
> Q. How long had you been working there? A. I worked there that time, from February

to December—February, 1908—no, February, 1909, until December 25th, 1909. * * * (p. 33, Abst.)

Q. Mr. Beale, I want to ask you some more questions. I didn't realize that you were the man that had made the inspection of this engine. Did you inspect it? A. Yes, sir.

Q. Now, what were your duties down there, Mr. Beale? A. My duties was looking after switch engines—after their electrical work, speed recorders.

Q. Well, did you make any inspection of engine 1255? A. Yes, sir.

Q. Well, did you make an inspection of that engine on the same day he was killed? A. Yes, sir.

Q. When did you inspect it? A. About 8 o'clock that morning.

Q. Was that before he was killed, or after? A. After. * * *

Q. And about 8 o'clock that morning you made an inspection of that engine? A. Yes, sir. (p. 34, Abst.) * * *

Q. Now, you may tell the jury exactly what you found on the inspection of this engine? (p. 35, Abst.)

Q. (By Mr. Latshaw) You may answer the question, Mr. Witness? A. Why, I found the brake piston—the piston to the left brake cylinder broken.

Q. How was it broken—in what way? A. Why, the threads were stripped off of the end of the fulcrum and left the piston rod useless to the driving brake.

Q. When you say the piston rod was useless, what do you mean by that? A. Why, it wasn't connected with the driving brakes.

Q. What difference does that make? A. When you turn the air in the cylinders the

piston went up and left the driving brakes loose.

Q. What do you mean by the 'driving brake'? A. Why, the driving brake is the one that the brake shoe goes up against the engine.

Q. The drive wheels? A. Yes, sir.

Q. Then, that piston rod had what connection with the brake on the drive wheels on the left side of the engine? A. Why, it would have no power on that side.

Q. Now, you have said that the piston rod was broken in what way? A. If I remember right, there was what we call the fulcrum—it screwed on to the end of the piston rod with threads—I believe they have anywheres from ten to nine threads to the inch, and it screwed on there, and them threads had been stripped or worn—until they stripped off, or were torn off. (p. 36, Abst.) * * *

Q. (By Mr. Latshaw) You may describe the looks and condition of the piston rod, in the place the threads were worn off? (p. 38.) A. Why, take threads on a rod—threads on anything; they keep working, and finally they strip themselves—what a machinist calls 'stripping.' They just tear the v's off of their threads.

Q. Does that come on gradually, or all of a sudden? A. No, it is gradually.

Q. When you say 'gradually,' what do you mean—hours, days or a week? A. It might take a week. It just depends on the material in the metal. Some is tougher than others; and, with the constant jar, they just naturally go.

Q. (By Mr. Latshaw) What did you say? A. I said they were 'stripped off'—what we call 'stripped.' I am a machinist, and have worked thirty years in the business; and the

threads, they don't strip just all of a sudden—they keep working and working and finally give way—and strip the whole threads right off. (p. 36, Abst.) * * *

Q.. (By Mr. Latshaw) Mr. Beale, when you were on the stand before, I asked you the question I am going to now; and you didn't answer it after the court had told you you could, and I forgot to ask it. What effect did the condition of the brake on the engine have, as you found them, what effect did that have upon the ability to stop the engine with the brake? A. Well, it would just have half braking power." (p. 178, Abst.)

Thurston L. McCartney, a witness on the part of the plaintiff, testified as follows:

"Q. What is your business? A. Fireman, Burlington. (p. 147, Abst.)

Q. Railroad fireman? A. Locomotive fireman.

Q. What road are you employed by? A. Chicago, Burlington & Quincy.

Q. How long have you been employed by them as a locomotive fireman? A. A year and three months—fifteen months. * * * (p. 147, Abst.)

Q. Did you take charge of that engine after this accident, 1255? (p. 150, Abst.) A. I didn't take charge of it, no.

Q. What did you have to do with it? A. We went out on her is all, afterwards.

Q. Who was 'we'? A. Engineer Hogan and myself. * * *

Q. What time of day did you take charge of it? A. At about seven-twenty. (p. 151, Abst.) * * *

Q. Now, what did you notice about the condition of that engine when you took charge of it? A. Why, I looked her over before I got on and the brakes appeared to be loose. (p. 151, Abst.)

Q. What brakes do you refer to? A. The drivers.

Q. The drivers are the large wheels, are they? A. Yes, sir.

Q. How many drivers did they have? A. Three on a side, six drivers.

Q. When you say they were loose, explain what you mean by that. A. They were hanging low and loose, lost motion in them; they didn't fit tight as they should with the application of the necessary air, although they fit. * * *

Q. How long did you work on that engine that day after you took it, the day of the death of Mr. Harrington? (p. 152, Abst.) A. I would say about one-fifteen, guessing at it. We went in to dinner with her and turned her in at that time.

Q. Who did you turn her in to? A. On the pit.

Q. What for? A. No brakes working good."

Oakey Hoagland, a witness on the part of plaintiff, testified as follows:

"Q. How long have you been a railroad engineer? A. Three years. (p. 153, Abst.) * * *

Q. What was the number of your engine on that trip that morning? A. 1255. (p. 156, Abst.) * * *

Q. Did you see that break yourself? A. Yes, sir. (p. 158, Abst.) * * *

Q. Yes, sir. Did you see with your own eyes the part that was broken? A. Yes, sir. (p. 158, Abst.)

Q. You may describe that broken part to us. A. It's a hard thing to do, explain a thing like that. Simply the piston that comes from the brake cylinder and comes down and fastens to the lever from your pump casting.

Q. Was that broken clear off? A. Right in two.

Q. How large a piece of metal is that? A. It's about an inch and a half probably, or three-quarters, in diameter, and probably about fourteen inches long.

Q. Where is the other end attached to? A. The other end is in the piston head in the brake cylinder. * * *

Q. What difference did that make on the brake, to have that part broken? A. Left a brake on one side of the engine only. (p. 159, Abst.)

Q. What do you mean by that? A. Well, by that brake piston being broken there was no leverage to your brake, but the air on the other side of the engine worked just the same.

Q. Which side? A. The left side. * * *

Q. Now, you say that the eye was broken on the left brake cylinder piston, I believe? (p. 163, Abst.) A. Yes, sir.

Q. That would affect the brake on the left-hand side of the engine only? A. Only the left-hand side."

B. I. Brooks, engineer on the train in question, put upon the stand by plaintiff in error, testified as follows:

"Q. Now, do you recall the time when your crew was engaged in putting up some cars

loaded with coal in the coal chute down there in the Burlington yard? (p. 183, Abst.) A. Yes, sir. * * *

Q. You were the engineer? (p. 183, Abst.) A. Yes, sir.

Q. And what was the engine you had? A. 1255. * * *

Q. Tell the jury what the condition of the engine was, with respect to the brakes? (p. 184, Abst.) A. The brakes were slack—needed adjusting—they didn't set up tight against the wheels. * * *

Q. What was the effect of the slacking in the brakes? A. The brakes wouldn't take hold as quick as if it set up tight. (p. 184. Abst.)

Q. Just explain to the jury what you mean by that? A. Why, the piston rod run out so far that it took a longer time for the brake to set than it would if it set up tight. * * *

Q. Was there any smoke or fog or steam around the yards there at that time? (p. 186, Abst.) A. Yes, quite a good deal.

Q. 'Quite a good deal.' Now, after you had these eleven cars attached to your engine, and the air coupled up, you then proceeded to put the cars up in the coal chute? A. Yes, sir.

Q. There was some testimony here, yesterday, about you having attempted to put them up one time and being unable to get them clear up in the coal chute, so that you had to back down and start over again? A. Yes, sir; we made one run.

Q. Just explain to the jury all about that, if you will, please. A. Well, we made one run for the coal chute and 'laid down,' couldn't get up there; and then we backed down and tried it again; and the next time we put them up."

Roy McGill, a witness on the part of the plaintiff, testified as follows:

"Q. You were foreman of that crew, were you? (p. 49, Abst.) A. Yes, sir.

Q. Was Mr. Harrington, when you saw him last, in the place where you told him to be? A. Yes, sir. * * *

Q. Now, I want you to tell the jury, Mr. McGill, about 'spotting' these cars. What does 'spotting' the cars mean? A. Putting them in a position to be unloaded. (p. 49, Abst.)

Q. And were you trying to 'spot' these coal cars up on the chute there at the time? A. Yes, sir. * * *

Q. And where was the place that you generally stood to 'spot' the cars? A. It was customary for the foreman to stand down on the ground, some place near to the approach to the chute; and, when he got the cars near to the position that he wanted them, making allowances for the engineer to bring them to a stop at that point, where he wants them to stop, to stop him. (p. 50, Abst.)

Q. Did you give that signal on this occasion? A. Yes, sir.

Q. And when you gave that signal on this occasion, did the cars stop? A. No, not right away.

Q. And what did you do then, when they didn't stop? A. I kept on giving him the signal to stop.

Q. And after you gave the first signal to stop, what was the next signal that you gave? A. The stop signal.

Q. Was the first signal any different from the second stop signal? A. Well, yes; I presume it was. I was getting pretty anxious for him to stop, the second signal.

Q. Yes, sir. In what way did the second signal differ from the first stop signal? A. Well, in making a stop we ordinarily give him a stop signal; and if you want him to stop very bad, you probably give the same signal a little faster. * * *

Q. About how many signals did you give the engineer to stop the engine, before it finally came to a stop? (p. 51, Abst.) A. Oh, I couldn't determine that, how many signals I gave him. I might have given him a dozen; I might have given him more.

Q. Yes, sir. Do you remember hearing the crash there? A. Yes, I heard the cars hit.

Q. Crash into something? A. Yes, sir.

Q. Did you know at the time they crashed, what they had crashed into? A. I heard them hit something. * * *

Q. Now, after they came to a full stop, what did you do, Mr. McGill? (p. 53, Abst.) I will ask you this: after you heard the crash, what did you do? A. If I remember right, before he—at the time he stopped, I started to walk to the south end of the—

Q. (Interrupting) Chute? A. Of the coal sheds.

Q. Yes, sir. And what did you find when you went to the south end of the coal shed? A. Well, I found that there was a car—a coal car, partly loaded with sand, up there, and we had hit it. Those cars of coal had hit this car of sand, and it knocked it back—the knuckles being closed on the two cars, it didn't couple up; and they had hit it hard enough to knock it back against the bumping post; and they had broken the bolts off of that along the rail-joint, that holds it together, and the post was partly turned around."

The defendant in error respectfully submits to the Court that the foregoing testimony was more than sufficient to support the finding of the jury to the effect that the death of Patrick Harrington was caused by the defects in engine 1255 and that same was the proximate cause of the death of said Harrington, and that the foregoing testimony was amply sufficient to support the finding of the appellate court of the state of Missouri, in that the death of Harrington was caused by the defects in the engine and that said defects were the proximate cause of his death.

This Court has specifically held in the case of *Central Vermont Railway Co.* v. *White, Admin.*, 238 U. S. 507, that the Federal Employers' Liability Act abolishes the Federal servant rule and that an employee does not assume risks arising from defects in engines.

SEVENTH.

We apprehend that this Court will not, under the circumstances of this case, decide whether the Federal Employers' Liability Act or the state law applied to this case, for the reason that the Missouri law under which this case was tried was much more favorable to plaintiff in error than the Federal Employers' Liability Act, and when such is the case this Court will not decide which law applied, for the reason that the position of plaintiff in error was made better by applying the state law instead of the Federal Employers' Liability Act.

Kansas City Western Ry. Co. v. *Geo. B. McAdow*, 36 Sup. Ct. Rep. 252.

Chicago, R. I. & Pac. Ry. Co. v. *Lizzie L. Wright and Henry C. Burge, Admst.*, 36 Sup. Ct. Rep. 185.
Chicago & Northwestern Ry. Co. v. *Gray*, 237 U. S. 399.

This case was founded on and tried under Sections 5426, 5427 and 5434 of the Revised Statutes of Missouri 1909, said sections being as follows, to-wit:

"SEC. 5426. *When representative may sue.*—Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

"SEC. 5427. *Damages, by whom recovered—measure of.*—Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in Section 5425; and in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

"SEC. 5434. *Liability of railroad corporations for damages to agents or servants.*—

> Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof. Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

Section 5425 of the Revised Statutes of Missouri of 1909, which is referred to in Section 5427, provides, among other things, that the damages may be recovered as follows:

> "First; by the husband or wife of deceased; * * *"

Among the instructions given to the jury by the trial court were the following instructions, to-wit:

"The court instructs the jury that, if you shall find and believe from the evidence in this case, that the plaintiff is the widow of Patrick Harrington, deceased; that on the 11th day of December, 1909, the said Patrick Harrington was in the employ of defendant and engaged as said employee in the capacity of switchman in defendant's yards in Kansas City, Missouri; that, on said date, it became and was the duty of said Patrick Harrington in the discharge of his said services as switchman, as aforesaid, to ride upon a certain train of cars then and there engaged in shoving certain coal cars to an elevated position in defend-

ant's coal shed located in said yards; that, while so riding upon said train of cars, said Patrick Harrington was in the exercise of such care for his own safety as an ordinarily careful and prudent man would exercise under the same or similar circumstances; and, if you further find and believe from the evidence that at said time and place said cars or train of cars was being propelled by an engine furnished by the defendant; that the brake appliances on said engine were so worn and defective as to be not reasonably adequate and sufficient for the purpose for which they were used; that said worn and defective condition of said brake appliances, if you find from the evidence they were so worn and defective, was known to the defendant, or by the exercise of ordinary care could have been known to defendant, in time, by the exercise of ordinary care, to have repaired and made the same reasonably adequate and sufficient for such use, before the alleged injury and death of plaintiff's husband, but that defendant negligently failed to do so; that, in direct consequence of said worn and defective condition of said brake appliances, if you find from the evidence they were worn and defective, and, for that reason, not reasonably safe for the purpose for which they were used, the engineer in charge of said engine was unable by the exercise of reasonable care to stop said train of cars within reasonable time and distance and said train of cars upon which plaintiff's husband was so riding, if you so find from the evidence, came into actual collision with a sand car then and there standing south of said coal shed, on said elevated track,

with unusual force and violence, thereby causing the car upon which plaintiff's said husband was riding, if you find he was so riding, to jerk or jolt in a sudden or violent manner, and in an unusually sudden and violent manner, and, in direct consequence of which, plaintiff's said husband was thrown from said cars and killed, then your verdict should be for plaintiff, providing you further find and believe from the evidence that, at all said times, plaintiff's said husband was in the exercise of such care for his own safety as an ordinarily careful and prudent man would exercise under the same or similar circumstances." (Given.) (pp. 238-239-240, Abst.)

"The court instructs the jury that, if you find for plaintiff, then you may allow her such a reasonable amount, not exceeding ten thousand dollars, as you may find and believe from the evidence and under the instructions of the court, would be fair and just, and would reasonably compensate plaintiff for the loss of her husband, having regard to the mitigating circumstances attending the acts of negligence, if any, as defined by these instructions." (Given.) (p. 240, Abst.)

"You should not, in making up your verdict, indulge in mere speculation or guess-work. If you are unable to determine to your reasonable satisfaction, from the evidence, whether or not Mr. Harrington's death was caused by negligence (if any) of the defendant, as defined in other instructions, without indulging in such speculation or guess-work, then you should return a verdict in favor of the defendant." (Given.) (p. 245, Abst.)

"The court instructs the jury that at and during the time of his employment with defendant, Patrick Harrington contracted and agreed to assume, and did assume, all of the risks ordinarily incident to the employment in which he was engaged; and if you shall believe from the evidence that said Patrick Harrington was caused to slip or fall, from the car upon which he was riding by reason of the ordinary movements or motions or jolts or jerks of the cars while engaged in placing loaded coal cars in the coal chute in question, or if you shall believe from the evidence that said Harrington was caused to fall, or did fall, by reason of slipping or losing his balance, and that said slipping or losing of his balance, if any, was the result of the ordinary movements or motions or jolts or jerks of the cars while being placed in the said coal chute as aforesaid, then you are instructed that the defendant is not liable in this case, and your verdict must be in favor of the defendant." (Given.) (p. 246, Abst.)

"The court further instructs the jury that, if you shall believe from the evidence that Mr. Harrington's death was the result of a mere accident, occurring in the usual and ordinary course of the work in which he was engaged, then your verdict should be in favor of the defendant." (Given.) (p. 247, Abst.)

"The court instructs the jury: That, under the law it was the duty of Patrick Harrington, at all times, while engaged in working for the defendant Railway Company, to use and exercise that degree of care and caution for his own safety which an ordinarily prudent and cautious man would

exercise under the same or similar circumstances; and if you shall believe from the evidence that at the time said Harrington was riding the empty coal car up the incline approach to the coal chute in question for the purpose of uncoupling the loaded cars, he was sitting on the edge of said empty car with his feet resting on the brake platform, and that an ordinarily prudent and cautious man would not have done so under the same or similar circumstances, and that by reason thereof the said Harrington was caused to fall and receive injuries resulting in his death, then you are instructed that the plaintiff cannot recover anything in this case, and your verdict must be in favor of the defendant." (Given.) (pp. 246-247, Abst.)

Under the foregoing instructions of the trial court the jury were instructed that they could not find in favor of the plaintiff (defendant in error) unless they found deceased was in the exercise of ordinary care, and further found that deceased was guilty of no negligence whatsoever, and unless they further found that the death of deceased was not caused by any of the risks assumed by the deceased, and unless they further found that the death of deceased was actually caused by the defective engine.

The jury by its verdict in this case found that the deceased was at all times in the exercise of ordinary and reasonable care for his own safety; that the death of the deceased was not caused by any risk assumed by deceased; and that the death of deceased was actually and directly caused by the defective engine.

We respectfully submit to the court that the State Act is more favorable to the Railway Company than is the Federal Employers' Liability Act for the reason that the State Act declares that where the employe is guilty of any negligence whatsoever, then there can be no recovery for his injury or death. While the Federal Liability Act, on the other hand, declares that the employe's negligence shall not bar a recovery in any case, but shall only operate to diminish the damages proportionally. In other words, under the State Act, if the employe is guilty of any negligence, there can be no recovery in the case, while under the Federal Act, even though the jury may find and believe from the evidence that the employe was guilty of negligence, still he may recover a proportionate verdict against the Railway Company.

We respectfully submit that even if the Federal Act applied to this case (which we deny) the Railway Company was not prejudiced by submitting this case under the State Act.

In the case of *Chicago, Rock Island & Pacific Railway Company* v. *Wright, et al., Admst.*, 36 Sup. Ct. Rep. 185, the court said:

> "But error affords no ground for reversal where it is not prejudicial, and here it is plain that the company was not prejudiced. While there are several differences between the state act and the act of Congress, the only difference having a present bearing is one relating to contributory negligence. The State Act declares that in cases where the employe's negligence is slight, and that of the employer is gross in comparison, the former's negli-

gence shall not bar a recovery, but shall operate to diminish the damages proportionally. In other cases contributory negligence remains a bar as at common law. The Act of Congress, on the other hand, declares that the employe's negligence shall not bar a recovery in any case, but shall operate to diminish the damages proportionally in all cases, save those of a designated class, of which this is not one. Thus, it will be seen that the State Act is more favorable to the employer than is the Act of Congress. The instructions to the jury follow the State Act, and consequently were more favorable to the company than they would have been had they followed the Act of Congress. To illustrate: under the instructions given, and a finding that the intestate's injuries were caused by concurring negligence of the company and himself, and that his negligence was more than slight and the company's less than gross, must have resulted in a verdict for the company, while, under instructions following the Act of Congress, such a finding must have resulted in a verdict for the plaintiffs, with the damages proportionally diminished. Of course, no prejudice could have resulted to the company from the instructions being more favorable to it than they should have been under the controlling law."

We respectfully submit that this court will not decide which law applied, the State Act or the Federal Act, for the reason that the Railway Company could not have been and was not prejudiced or harmed in the trial of this case in said state court.

In the case of *Kansas City Western Railway Company* v. *McAdow*, 36 Supreme Court Reporter, 252, the court said:

> "But these questions really are immaterial here since the Kansas Statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances it is unnecessary to decide which law applied. *Chicago & Northwestern R. Co.* v. *Gray*, 237, U. S. 399. Judgment affirmed."

In the case of *Chicago & Northwestern Railway Co.* v. *Gray*, 237 U. S. 399, this court laid down the same proposition in strong and unmistakable language. Owing to the fact that the question of assumption of risk was submitted to the jury by the trial court, and the jury found that deceased did not assume the risk, and owing to the fact that this court in the case of *Central Vermont Railway Co.* v. *White, Admst.*, 238 U. S. 507, held that a railroad employe does not assume risks arising from defects in engines, the question of such assumption of risk is concluded.

Southern Ry. Co. v. *Lloyd*, 36 Sup. Ct. Rep. 210.

The foregoing are the only questions which we anticipate counsel for plaintiff in error will raise. We respectfully submit therefore to the court that the case was fairly tried and without error; that the verdict is for the right party; and for a reasonable amount; that the case was properly brought

and tried under the State Act; that the Railroad Company was not prejudiced or harmed thereby.

Wherefore, we respectfully request that the writ of error be dismissed, or the judgment affirmed, and that additional damages be assessed and awarded defendant in error as for delay, etc.

If these suggestions be denied, we respectfully pray that this case be transferred for hearing to the summary docket.

Respectfully submitted,

J. G. L. HARVEY,
Attorney for Defendant in Error.

13

Office Supreme Court, U. S.
FILED
APR 14 1916
JAMES D. MAHER
CLERK

No. 853.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET HARRINGTON, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT OR TRANSFER TO THE SUMMARY DOCKET.

WILLIAM WARNER,
OLIVER H. DEAN,
WILLIAM D. MCLEOD,
H. M. LANGWORTHY,
Attorneys for Plaintiff in Error.

O. M. SPENCER,
Of Counsel.

INDEX.

STATEMENT. Page.

1. Substance of Amended Petition 2
2. Substance of Amended Answer 2
3. Substance of Evidence upon the Issue as to Whether Deceased Was Employed in Interstate Commerce 4
4. Substance of Evidence Upon Issue of Liability of Defendant 5
5. Demurrer to Evidence and Issues Raised Thereby 8
6. Peremptory Instruction and Issues Raised. 8
7. Instruction No. 2 9
8. Verdict and Judgment 11
9. Motion for New Trial and Assignments Presented 11
10. Judgment of Court of Appeals 12
11. Motion for Rehearing 12
12. Application for Writ of Certiorari to State Supreme Court 12
13. Writ of Error Granted 13

14-16. Opinions of Court of Appeals 14

17. Substance of Motion for Rehearing 16
18. Substance of Assignments of Error 19

BRIEF AND ARGUMENT 23

I. The Federal Questions Presented.

1. Argument and Authorities on Federal Questions Presented 23
2. The Assignments of Error Are Not Too General 27

Page.

II. The Federal Questions Presented Are Not Frivolous 28

1. Discussion of Rule in Regard to Findings of Fact by State Appellate Courts 29

2. Discussion of Authorities Upon Federal Questions Presented 30

III. The Plaintiff Is Not the Proper Party to Maintain the Action 46

IV. The Proof Is Not Sufficient to Make Out a Case Under the Federal Employers' Liability Act 48

V. As to Placing the Case on the Summary Docket 57

Cases Cited.

Ambruster v. R. R. (Ia.), 147 N. W. 337 34

American R. R. Co. v. Birch, 224 U. S. 547 46

Barlow v. R. R., 143 N. Y. Suppl. 1053 . . . . . 33, 38

Byerly v. Light Co., 130 Mo. App. 593 . . . . . 51, 53

Central Vermont R. R. Co. v. White, Admr., 238 U. S. 507 27

Cousins v. I. C. R. R. Co. (Minn.), 148 N. W. 58 . . 33

Eastern R. R. Co. v. Ellis (Tex.), 153 S. W. 701 . . 46

Employers' Liability Cases, 207 U. S. 463 57

Fowler v. Elevator Co., 143 Mo. App. 422 51

Goransson v. Mfg. Co., 186 Mo. 300 51

Gr. Nor. Ry. Co. v. Knapp (U. S.), Mar. 20, 1916 . . 45

Hearst v. R. R., 188 Mo. App. 36 . . . . . 46, 48

Horton v. Navigation Co., 72 Wash. 503, 130 Pac. Rep. 897 32

Ill. Central Ry. Co. v. Behrens, 233 U. S. 473 58

Kamboris v. Navigation Co. (Ore.), 146 Pac. 1097 . . . . . 32, 43

Page.

K. C. M. & O. R. R. Co. v. Pope (Tex.), 152 S. W. 185, 153 S. W. 163..... 46
Law v. R. R. (C. C. A.) 208 Fed. 869..... 42
Maerkl v. R. R. (C. A. A.), 196 Fed. 1.....35, 42
Mallinckrodt Chemical Wks. v. State of Mo., 238 U. S. 41 26
Moliter v. Wabash, 180 Mo. App. 84..... 48
Montgomery v. R. R. Co., 64 Ore. 597, 131 Pac. 507 .....33, 39
N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 260.... 59
Norfolk & W. Ry. Co. v. Earnest, 229 U. S. 114.... 34
North Car. R. Co. v. Zachary, 232 U. S. 248.... .....26, 29, 34, 41, 44, 47
Patton v. Ry., 179 U. S. l. c. 663.....51, 52
Pedersen v. R. R. C 229 U. S. 146.....32, 35, 45
Penny v. R. R. (La.), 66 So. 313..... 46
Perkins v. R. R., 193 Fed. 219..... 51, 54
R. R. Co. v. Lester (Tex.), 149 S. W. 841..... 46
Rich v. R. R., 166 Mo. App. 379.....46, 48
Rivera v. Ry. Co. (Tex.), 149 S. W. 223..... 46
Rogers v. Hammond Packing Co., 167 Mo. App. 49..51
Rogers v. Hammond Packing Co., 180 Mo. App. 227 51
Ry. v. Brothers (Tex.), 165 S. W. 488..... 46
St. L. & S. F. Ry. Co. v. Seale, 229 U. S. 156.... .....24, 34, 45, 46, 47
St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265 .....25, 28
Second Employers Liability Cases, 223 U. S. 1.... 57
Southern Pac. Co. v. Schuyler, 227 U. S. 601, l. c. 611 29
Thompson v. R. R., 262 Mo. 468.....46, 48
Toledo St. L. & W. R. R. Co. v. Slavins, 236 U. S. 454. 48

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

VS.

MARGARET HARRINGTON, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

STATEMENT.

This action was first instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, by the Defendant in Error (plaintiff below, and hereinafter referred to as plaintiff) *as the widow* of Patrick Harrington, and was brought to recover damages, as provided under Sections 5425, 5426 and 5427 of the Revised Statutes of

Missouri for 1909, on account of the death of said Patrick Harrington, who was an employee of the Plaintiff in Error (defendant below, and hereinafter referred to as defendant) at the time of his death.

1. The amended petition, upon which the case was tried, alleges, in substance, that on December 11th, 1909, Patrick Harrington was employed by the defendant as a switchman in its switch yards in and around Kansas City, Missouri; that while so employed, and while engaged with other employees in switching certain coal cars up an incline into the defendant's coal chutes or sheds, which were located on an elevated structure, the deceased was caused to be thrown from the coal cars by reason of said coal cars coming into contact with a sand car standing on said elevated structure south of the coal chutes, and to be run over and killed; that the defendant was negligent in running said cars up said incline at a dangerously high rate of speed, in failing to have said cars under proper control, in failing to stop said cars at the proper place, in failing to give proper signals, in failing to warn plaintiff's husband that said cars would be run against said sand car, in that the engine which was being used to push said cars up said incline was defective, and the brakes and brake appliances thereon were defective and out of repair (see Record in Court of Appeals, pages 2-8, Transcript of Record in this court, pages 7 to 13).

2. The amended answer, filed by the defendant, consisted of a general denial, a plea of assumption of risk,

and a plea that the injury and death of the deceased were caused by his own negligence, and said answer contained the further allegation and defense (see Abstract of Record in Court of Appeals, pages 9-10, and Transcript of Record in this court, pages 14-15):

> "For a further answer and defense to said amended petition the defendant says that at all of the times referred to in said petition, this defendant was, ever since has been, and now is, a common carrier by railroad, engaged in interstate commerce between and through several of the states; that at the time of the accident resulting in the death of said Patrick Harrington, the train upon which the said Patrick Harrington was employed and was working, was engaged in interstate commerce, and the said Patrick Harrington was employed by this defendant in such commerce; that the liability of this defendant, if any, on account of or because of the death of said Harrington, was and is regulated and controlled solely by the Act of Congress, entitled 'An Act Relating to the Liability of Common Carriers by Railroad, to their Employees, in Certain Cases,' approved April 22nd, 1908 (35 Stat. at Large, page 65, Chap. 149; U. S. Comp. Stat. Supp. 1909, page 1171), and by the amendment to said Act, approved April 5th, 1910 (36 Stat. at Large, page 291, Chap. 143), and said liability, if any, was not and is not controlled or regulated by the common law, nor by any statute of the State of Missouri, under and by virtue of which the plaintiff seeks to recover, for the reason that said common law and statutes of the State of Missouri have been superseded, suspended and rendered inoperative by said Acts of Congress in cases where employees of common carriers by railroad engaging in interstate commerce suffer injury while employed in such com-

merce, or in case of the death of such employee; and this defendant is therefore not liable to plaintiff by reason of the matters and things alleged and set up in the plaintiff's said amended petition; and plaintiff is not the proper party to maintain or prosecute this action, and cannot recover anything of and from this defendant herein."

The reply to the answer consisted of a general denial.

3. The evidence upon the issue presented as to whether Harrington was employed by the defendant in interstate commerce, so as to bring him within the Federal Employers' Liability Act, was adduced by cross examination of plaintiff's witnesses, and shows conclusively that at the time of the accident and death of the deceased, the defendant railroad company was engaged in interstate commerce; that its tracks extended into foreign states; that it continuously received into its switching yards in Kansas City, cars delivered to it by practically all of the other railroads coming into Kansas City, Missouri, which cars were loaded with freight brought from points without the state, and that many of those cars were destined to points beyond the state; that the switching crews, including the crew with which deceased was working, were continuously engaged in switching cars received from points beyond the state, and in switching cars that were destined to points beyond the state, so that they were continuously engaged and employed in interstate commerce (Abstract of Record in Court of Appeals, pages 97-122, Transcript of Record in this court, pages 108-133).

The evidence on behalf of plaintiff further shows conclusively that the coal which was being switched by the deceased and other employes at the time of his death had previously been set apart by the railroad company as coal to be used upon its engines, and for some days had been in storage upon the company's storage tracks; that all of the switching engines of the defendant railroad company and all of its road engines were continuously engaged in interstate commerce, so that this coal had been set apart as an instrumentality of interstate commerce; that at the precise time of the accident, the deceased was engaged with other employes in switching this coal into the coal chutes for use exclusively as fuel upon engines engaged in interstate commerce (Abstract of the Record in Court of Appeals, pages 119-122, 137, Transcript of Record in this court, pages 130-133, 148-149).

4. The undisputed evidence upon the issue presented as to whether the death of the deceased was caused by any negligence upon the part of the defendants, shows in substance as follows:

The switching operations in question were being carried on about 7:00 o'clock in the morning (Transcript pp. 21-23, 53). It was still dark, and it was "awful cold weather," and that morning it was "hazy" and "foggy" and "frosty." The cars were "sleety and icy" (Transcript pp. 86, 97, 98, 105). The crew was engaged in switching three loaded cars of coal into the company's coal shed or chute, a picture of which is shown opposite pages 66, 67

and 84 of the Abstract of the Record in the Court of Appeals (Transcript in this court, pages 74, 75, 95). The coal chute or shed was so arranged that three ordinary coal cars could be placed inside of the shed and then unloaded into the bins or pockets (Transcript 77). At the time in question, the string of cars being pushed up the incline into the coal chutes included the three loaded cars and eight empty cars, the three loaded cars being farthest from the engine. The deceased was riding upon an empty car which was the eighth from the engine, and the one next to the three loaded coal cars, it being his duty to uncouple the loaded cars from the empty cars as soon as they were placed in proper position in the chute (Transcript 79-82).

The last time Mr. Harrington was seen alive he was seated on the south end of the eighth empty coal car, next to the first loaded car, with his feet over the edge of and resting upon the brake platform, which is between the two cars, and right at the point where he would have to uncouple the three loaded cars after they had been placed in the proper position in the coal chute. When last seen he was at a point about 10 or 12 feet *outside* the coal chute (Transcript pp. 55, 81, 82, 92, 93, 106, 107).

The cars were not stopped so as to leave the loaded cars at the entrance to the coal chute, but for some reason were pushed into the chute, so that when they stopped, the first empty car on which the deceased had previously been riding, was a half or two-thirds of its length inside the chute, and at that time the south coal car struck the

empty sand car which was standing on the elevated track just beyond the coal chute (Transcript pp. 59, 87, 88).

The cars were then pulled back so that the coal cars were in proper position in the coal chute and they were uncoupled by one of the employes in the chute, and immediately afterwards the dead body of deceased was found lying on the track about eight feet *outside* of the entrance to the coal chute (Transcript pp. 59-61, 94-96).

There is no direct evidence as to what caused the deceased to fall, but one witness testified that just before the car on which deceased was riding entered the chute, he saw Harrington "go down" between the cars as though to uncouple them (Transcript pp. 238-241).

There was evidence tending to show that the body of the deceased was mutilated (Transcript pp. 24-37), and that it had some coal dust on it, and from this the plaintiff seeks to have the inference drawn, *first*, that the deceased remained in the position in which he was last seen and was carried into the coal chute, and *second*, that by reason of the coal cars striking the sand car, he was thrown down between the cars on which he was riding, to the track, and *third*, that thereafter he was dragged back a distance of 25 or 30 feet to the point where he was found on the track, and thus to connect up the injury and death with the collision.

The physical facts demonstrate conclusively, however, that the deceased must have fallen from the car before it entered the chute, by reason of slipping as he started to get down to uncouple the cars, or by reason of the

usual and ordinary movements of the cars, and that the collision was not, and could not have been, the proximate cause of his death, and that the defendant is not liable on account of the death of the deceased under the Federal Employers' Liability Act, or under the state laws.

5. At the close of the plaintiff's case, the defendant demurred to the evidence, and asked the court to instruct the jury peremptorily to return a verdict in favor of the defendant (Abstract of Record in Court of Appeals, p. 180, Transcript of Record in this court, p. 191), and at the same time interposed the following specific demurrer, to-wit:

> "The defendant demurs to the evidence and asks the court to peremptorily instruct the jury to return a verdict in favor of the defendant for the following reasons: First, the evidence fails to show that the deceased came to his death by reason of any negligence on the part of the defendant company, or any of its employees; second, the evidence shows conclusively, that at the time of the injury and death of the deceased the defendant company was engaged in interstate commerce; and the deceased himself was employed in interstate commerce."

These demurrers and requests for peremptory instruction were overruled, the defendant duly excepting (Abstract of Record in Court of Appeals, page 181, Transcript of Record in this Court, pages 192-3).

6. At the close of the entire case, the defendant again requested the court to peremptorily instruct the jury that their verdict must be for the defendant (Ab-

stract of Record 233, Transcript of Record in this Court, 244, 251, 258), which was denied, the defendant duly excepting. Thereupon the court submitted the case to the jury under instructions permitting plaintiff to recover *as the widow* of Patrick Harrington under the laws of the state of Missouri, to which instructions the defendant duly excepted (Abstract of the Record in Court of Appeals, pp. 233, 240, Transcript of Record in this Court, pp. 244-251).

7. Defendant also requested, among others, the following instruction, which instruction was refused, the defendant duly excepting (Abstract of Record, pp. 241-3, 247, Transcript of Record in this Court, pp. 252-254, 258):

"2."

"If you shall believe from the evidence that at and before the injury and death of Mr. Harrington, the defendant Railroad Co. was and had been operating lines of railroad running from Kansas City, Missouri, into and through other states, and that it then was and had been engaged in transporting for hire freight and passengers from Kansas City, Missouri, into and through other states and from said other states to Kansas City, Missouri, over its said lines of railroad, and that it was then, and had been engaged in receiving from other railroad companies, operating railroad lines running from said Kansas City, Missouri, into and through other states, freight and passengers transported by said other railroad companies over their respective lines of railroad from said other states, into said Kansas City, Missouri, and that said freight and passengers so received by defendant Company were destined to still

other states, and were by defendant Company, when so received, transported to said other states from Kansas City, Missouri, and that Mr. Harrington was then and had been in the employ of the defendant Railroad Co. as a member of one of its switch crews, operating in its switch yards in Kansas City, Missouri, and that it was then and had been the duty of said Harrington, under such employment, to aid and assist other members of said crew in the switching of freight cars containing freight while enroute with such freight into, through and out of said switch-yards from and to destinations from state to state—that is, from points in one state to points in another state, either over the lines of the defendant Railroad Company, or the lines of that Company and connecting lines of other railroad companies, running into other states, and that said switching of said freight cars containing such freight, was conducted in the usual and ordinary course of railroad business in the movement of said cars and freight, destined from points in one state to points in other states; and if you shall also believe from the evidence that it was a part of defendant's duty, under such employment, to aid and assist the train crew of which he was a member in the work of placing loaded coal cars into the coal chute or coal shed referred to in the testimony, and that he was engaged in the performance of that work at the time of his injury and death, and that the coal cars were being moved by one of defendant's engines which was and had been generally used in and for the switching work hereinbefore mentioned, and in placing cars loaded with coal in said coal shed or chute, and that the coal was being placed by said train crew in said coal shed or chute at the time of Mr. Harrington's injury and death, for use by defendant in such transportation of freight from one state into and through other states, and that said coal in the ordinary and

usual course of its railroad business was by means of chutes loaded into railroad engines of the defendant Company for use in the transportation by defendant of freight from the State of Missouri, into and through other states, as aforesaid, or from said other states into the State of Missouri at Kansas City, and that such coal was so used by defendant in the usual and ordinary course of its business in so transporting such freight, then the court instructs you that the defendant Company was engaged in interstate commerce, and Mr. Harrington was employed in such interstate commerce, and therefore this plaintiff cannot maintain this action, is not entitled to recover herein, and you should return a verdict in favor of the defendant Company."

("Refused.")

8. The case was thereupon submitted to the jury and a verdict rendered in favor of the plaintiff for the sum of $8250.00, which was subsequently reduced by *remittitur* to $7500.00 (Abstract of Record in Court of Appeals, p. 11, Transcript of Record in this Court, p. 16).

9. Thereafter, in due time, the defendant filed its motion for a new trial, which among others, contained the following assignments of error (Abstract of Record, pp. 250-252, Transcript of Record in this Court, pp. 261-263):

"4. The court committed error in overruling defendant's demurrer to the evidence, interposed at the close of plaintiff's case.

5. The court committed error in giving each and every of the instructions which it did give on behalf of plaintiff.

7. The court committed error in refusing defendant's instructions No. 1 (the peremptory instruction), No. 2, No. 3 and No. 9, and each of them."

10. Thereafter, the case was duly appealed to the Kansas City Court of Appeals, being the Appellate Court in the State of Missouri, having jurisdiction of said cause and of said appeal, and said judgment was affirmed by the Court of Appeals in October, 1913, and said judgment of affirmance was set aside and a rehearing granted, and said judgment again affirmed in July, 1914, but said judgment of affirmance was set aside and a rehearing granted, and said judgment was again affirmed in July, 1915 (Transcript 268-271).

11. Thereafter, in due time, the defendant filed its motion for rehearing, which motion was taken under advisement, and subsequently overruled on the 22d day of November, 1915, (Transcript of Record, p. 305).

12. Subsequently, the defendant applied to the Supreme Court of the State of Missouri for *Writ of Certiorari* to have the record of said cause certified to the Supreme Court, which application for Writ of Error was by the Supreme Court denied, for the reason that under the constitution and statutes of the state of Missouri, said Supreme Court had no jurisdiction of said cause, and that said Kansas City Court of Appeals was and is the highest court of said State of Missouri in which a decision can be had.

13. Thereafter, the defendant duly applied for and was granted a Writ of Error to have judgment of the Kansas City Court of Appeals reviewed by this court.

14. The opinions filed by the Court of Appeals at the time of the final affirmance of the judgment of the trial court are set out in the transcript of the record, pages 272-296, the Presiding Judge Ellison dissenting from the majority opinion, on the ground that the deceased was employed in interstate commerce at the time of the accident resulting in his death, and that his widow was not entitled to maintain the action under the Federal Employers' Liability Act.

The majority, concurring and dissenting opinions, are all set out in the defendant in error's brief, pp. 6-35, and we will not re-copy them here.

15. In the majority opinion by Judge Johnson, after quoting that part of the answer alleging that the defendant was engaged in interstate commerce, and the deceased at the time of his death was employed by it in such commerce, and that the liability of defendant, if any, was and is controlled solely by the Federal Employers' Liability Act, and that the defendant could not maintain the action, he (Judge Johnson) makes the following statement of the proof upon this issue (Brief of Defendant in Error, Pages 13-14).

> "The proof relating to the issue thus raised is as follows: Defendant owns and operates a system of railroads covering this and a number of other western states and is a common carrier of both

interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars used in both kinds of traffic, are received, sent out cared for and repaired in the yards. The switching crew of which Harrington was a member did not work outside of this state and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic."

He makes further statements with respect to the operation of local trains by the defendant to terminal points within this state, but there is no evidence in support thereof, and also makes the statement that the defendant had procured coal from mines in this state, and hauled it to its storage track where it remained until needed, and the same statement was made in the concurring opinion of Judge Trimble, but there is no evidence whatever in support of the statements in reference to the coal being procured from mines in this state or elsewhere. Defendant owns no mines in this state, and there is no evidence to that effect. The evidence simply shows that the coal in question had been in storage on the defendant's storage tracks for a week or ten days, and was placed there for the purpose of being used to supply engines engaged in interstate commerce,

16. On the issue as to whether the negligence alleged was shown to be the proximate cause of the death of the deceased, Judge Johnson says in the majority opinion, as follows, (Brief of Defendant in Error, pp. 6-7):

> "Plaintiff sued under the statutes of this State to recover damages for the death of her husband which she alleges was caused by negligence of defendant. At the time of his death, which occurred before seven o'clock in the morning of December 11, 1909, the husband of the plaintiff was employed as a switchman in defendant's yards in Kansas City and was a member of a crew engaged in switching three loaded cars to an elevated coal shed in the yards. The track ran up on a trestle into, through and about one hundred feet beyond the coal shed and the cars were to be left in the shed for unloading into bins. The train included a number of cars, the three loaded cars being in front as the train was pushed up the incline. The first attempt of the engineer to push the cars into the shed was unsuccessful and he pulled the train back, took a fresh start and came on the second time at higher speed. Owing to defects in the engine he was unable to stop at the required place and the front end of the train ran through and beyond the shed and collided violently with a car of sand standing on the track. Harrington was riding on the end of an empty car just back of the third car of coal. When the collision occurred he was fifteen or twenty feet inside the shed. In response to a signal from the foreman the engineer pulled ahead until the loaded cars were moved back into the shed, then a workman uncoupled the loaded cars and the remainder of the train proceeded. Immediately afterward the body of Harrington was discovered on the track at a

point about six feet outside the shed, or twenty or twenty-five feet from where he was at the time of the collision."

The court further quotes evidence of witnesses who testified that the body of the deceased was crushed and mutilated, and had coal dust imbedded in the skin.

17. The motion for rehearing filed in the Court of Appeals by the defendant was based in substance upon the following, to-wit (Transcript of Record, pp. 298-304):

> That the majority opinion and the judgment of the court is in conflict with the decision of this court in the case of *New York Central & Hudson River R. R. Co.* v. *Bernard J. Carr,* 238 U. S. 260.
>
> That the opinion and judgment of the court is in conflict with the case of *Horton* v. *Navigation Co., 72* Wash. 503; 130 Pac. 897, in which case the facts are substantially the same as in the case at bar, which case was cited with approval by this court in the case of *Pedersen* v. *Railroad,* 229 U. S. 146.
>
> That the court in its judgment overlooked the fact that the coal in question was placed in storage as company coal when it was placed on the storage tracks in the yards at Kansas City, and was being applied as an instrumentality of interstate commerce at the time it was being carried from the storage tracks to the coal chutes to be dumped into the tenders of the engines used for hauling interstate commerce; that there was therefore no distinction between the facts in that case and the facts in the case of *Pedersen* v. *Railroad,* 229 U. S. 146, in which the employee was carrying bolts instead of coal to be used in repairing a bridge used in both kinds of commerce.

That the court in its opinion and judgment overlooked the fact that there was no evidence that the coal which was being handled by the deceased would be, or was being, supplied for use on engines engaged in hauling intrastate commerce, but the evidence showed that the coal was being hauled and supplied for use on engines, all of which were necessarily engaged in hauling interstate commerce.

That the test announced by the court in its opinion, as to when an employee is engaged in interstate commerce, is contrary to the test announced by this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146, in the case of *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, and in the case of *The New York Central & Hudson River R. R. Co.* v. *Bernard J. Carr*, 238 U. S. 260.

That the opinion and judgment of the court was in direct conflict with the case of *Railway* v. *Taerkl*, 198 Fed Rep. 1, which case was cited with approval by this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146.

That the judgment of the court is in direct conflict with the decision of the Supreme Court of Oregon in the case of *Kamboris* v. *Oregon-Washington R. & Nav. Co.*, 146 Pac. 1097, which latter decision was based squarely upon the decision of this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146, it appearing in the Kamboris case that the facts are precisely the same as in the case at bar.

That the judgment of the court was in conflict with the case of *Montgomery* v. *Railroad*, 64 Ore. 597, 131 Pac. 507, which case was based upon the decision of this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146, and in which the facts are the same as in the case at bar.

That the judgment of the court was in conflict with the case of *Cousins* v. *Railroad*, 148 N. W. 58, decided by the Supreme Court of Minnesota,

and based upon the decision of this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146,

That the judgment of the court is in direct conflict with controlling decisions of the Supreme Court of the United States and the United States Circuit Courts of Appeals, cited in the briefs, and in conflict with the logic and reasoning of those decisions.

That the interpretation of the court in its opinion and judgment of the Act of Congress, commonly known as the Federal Employers' Liability Act, was contrary to the interpretation of said Act by the Supreme Court of the United States and by the United States Circuit Court of Appeals, and by the Supreme Courts of the States of New York, Washington, Minnesota and Oregon.

That the court by its decision, denied the defendant the rights, privileges and immunities, especially set up and claimed under the Federal Employers' Liability Act hereinabove referred to, and especially pleaded in defendant's Amended Answer, and that the opinion and judgment of the court, if allowed to stand, would result in the taking of the property of the defendant without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

That the defendant, as shown by the pleadings and the record, claimed rights, privileges and immunites under the Federal Employers' Liability Act, and the decision of the court was against the rights, privileges and immunities especially set up and claimed by defendant under said Act, and said decision is in direct conflict with the decision of this court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146.

That the defendant, as shown by the record herein, especially set up and claimed rights, privileges and immunities under and by virtue of Section 8 of Article 1 of the Constitution of the United States, giving to Congress the power to regulate commerce with foreign nations, and among the several states, and its decision was against the rights privileges and immunities specially set up and claimed by defendant thereunder.

That the court in its opinion overlooked evidence relating to the employment of the deceased, which evidence showed conclusively that the deceased was engaged and employed by the defendant in interstate commerce, at the time of his death.

That the court misunderstood the facts relating to the court as to whether or not the negligence alleged in the petition was shown to have been the proximate cause of the injury and death of the deceased.

That the decision of the court, relating to the question of whether or not the negligence alleged was shown to be the proximate cause of the injury and death of the deceased, was in conflict with the decisions of the Supreme Court.

18. The Assignments of Error (Transcript of Record 339-346), filed herein at the time of filing the application for writ of error, again present for the consideration of this court the Federal questions presented in the trial and appellate courts. They are, in substance, as follows:

1. That the Court of Appeals erred in holding that: "the case does not fall within the operation of the Employers' Liability Act, and is controlled by the laws of the state in force at the time of the injury."

2. That the Court of Appeals erred in holding that under the evidence the liability, if any, of the defendant on account of the death of Patrick Harrington was not regulated and controlled by the Act of Congress known as the Federal Employers' Liability Act, but was and is controlled by the laws of the state of Missouri.

3. That the Court of Appeals erred in that although it found as a matter of law that the defendant railroad company was engaged in interstate commerce, and that the deceased at the time of his death was engaged in supplying fuel to locomotives engaged in interstate commerce, that nevertheless such facts did not bring the case within the operation of the Federal Employers' Liability Act.

4. That the Court of Appeals erred in that although it found that the defendant was a common carrier by railroad engaged in interstate commerce, it held that at the time of the accident resulting in the death of Patrick Harrington he was not employed by the defendant in such interstate commerce within the meaning of the Federal Employers' Liability Act, as the same was construed by the United States Supreme Court in the case of *Pedersen* v. *Railroad*, 229 U. S. 146.

5. That the Court of Appeals erred in adjudging that the action could be maintained and prosecuted by the defendant in error (plaintiff below) as the widow of Patrick Harrington, to recover damages on account of his death, and that the Act of Congress known as the Federal Employers' Liability Act, requiring causes of action, if any, therein provided for, in the case of the death of an employee, to be maintained by the personal representative of the deceased, did not apply in this case, and in adjudging that the action could be maintained by the plaintiff as widow of the deceased, Patrick Harrington.

6. That the Court of Appeals erred in declining to adjudge as a matter of law that under the undisputed evidence adduced on behalf of Defendant in Error (plaintiff below) the defendant railroad company was not and is not liable to plaintiff on account of the death of Patrick Harrington, and in declining to hold that under the provisions of the Act of Congress known as the Federal Employers' Liability Act, there was no evidence adduced tending to prove that plaintiff was or is liable or responsible for the death of said Harrington.

7. That the Court of Appeals erred in affirming the judgment of the Circuit Court of Jackson County, Missouri, adjudging as a matter of law that under the undisputed evidence adduced on behalf of plaintiff the deceased Patrick Harrington was not employed by the defendant railroad company in interstate commerce.

8. That the Court of Appeals erred in entering judgment affirming the judgment of the trial court overruling the demurrer to the evidence interposed on behalf of defendant at the close of plaintiff's case.

9. That the Court of Appeals erred in entering judgment affirming the judgment of the trial court, refusing to give the peremptory instruction requested by the defendant at the close of the entire case.

10. That the Court of Appeals erred in affirming the judgment of the trial court, refusing to give to the jury instruction No. 3 requested by defendant after the court had refused to sustain said demurrer and give said peremptory instruction, which instruction No. 3 submitted to the jury the question as to whether or not the deceased was employed in interstate commerce, and is set forth in full in the assignments of error.

11. That the Court of Appeals erred in declining to adjudge as a matter of law that under the provisions of the Federal Employers' Liability Act, the defendant was not liable to plaintiff on account of the death of Patrick Harrington, and that said death was not caused by reason of any negligence upon the part of the defendant.

12. That the Court of Appeals erred in entering judgment affirming the judgment of the trial court in said cause.

13. That the Court of Appeals erred in affirming the judgment of the trial court overruling the motion for a New Trial duly filed on behalf of defendant.

14. The Court of Appeals erred in overruling the motion for rehearing duly filed on behalf of defendant.

BRIEF AND ARGUMENT.

I.

The Federal Questions Presented.

In the motion filed on behalf of defendant in error she first asks this court:

> "To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no federal questions being involved therein, especially none which can affect the rights of plaintiff in error."

1. There is manifestly no merit in this contention. As heretofore pointed out, the defendant in its Amended Answer pleaded that at the time of the accident resulting in the death of the deceased Harrington, the railroad company was engaged, and the deceased was employed by it in interstate commerce, and that the question of liability, if any, was controlled solely by the terms of the Federal Employers' Liability Act, and not by the laws of the state of Missouri, and that the plaintiff being the widow of the deceased was not the proper party to maintain the action.

The evidence adduced on behalf of the plaintiff below, fully disclosed the nature of the employment of the deceased at the time of the accident, that is, he was employed generally as a switchman, and was engaged in switching cars engaged in interstate commerce, and at the

precise time of the injury was switching loaded cars of coal from the company's storage tracks to its coal chutes for the purpose of supplying engines engaged in interstate commerce with fuel.

By a demurrer to the evidence at the close of the plaintiff's case, and by a demurrer and request for peremptory instruction at the close of the entire case, the defendant again set up and asserted its rights under the Federal Employers' Liability Act, and asked to have the court declare as a matter of law that the provision of that Act applied, and that there was no liability under that Act, and that the plaintiff could not maintain the action.

After the demurrers and the peremptory instruction were denied, the defendant asked an instruction presenting the question to the jury, which was also denied.

The same questions were appropriately raised in the motion for new trial, which was overruled.

Upon appeal, these questions were presented to and considered by the Court of Appeals, and the rights set up by defendant under the Federal Employers Liability Act after full discussion were denied to it.

The same questions are again fully presented in the Assignments of Error in this court.

The situation in this case is almost exactly like that in the case of *St. L. & S. F. Ry. Co.* v. *Seale*, 229 U. S. 156. In that case the action was brought against a railroad company by the widow and parents of one of its employes, to recover damages for his death while employed by the railroad company. A motion to dismiss

was interposed in this court, which motion was denied. This court said (p. 157):

> "In the trial court and again in the Court of Appeals the railroad company contended that the injuries which caused the death of the deceased were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149; and that, if liable, it was liable only to his personal representative and not to the plaintiffs or any of them. This contention was denied by both courts, and the correctness of that ruling is a matter now to be considered."

In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *McWhirter*, 229 U. S. 265, an action was brought to recover damages for the death of an employee based upon an alleged violation of the Federal Hours of Service Act. A motion to dismiss was filed in that case, and the motion was overruled, this court saying (p. 275):

> "And of course as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination."

And the court further says (p. 277):

> "While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat. Sec. 709, yet where in a controversy

> of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the case of *Mallinckrodt Chemical Wks.* v. *State of Missouri*, 238 U. S. 41, the action was brought to forfeit the charter of the Plaintiff in Error, for failure to file an affidavit as required by the Missouri Statutes. A motion to dismiss was filed, based upon the ground that the Federal questions were not raised in the trial court with sufficient definiteness. This court said (p. 49):

> "It appears, however, from the opinion of the Supreme Court (249 Missouri, 704 (8), 733), that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon this court, and the motion to dismiss must be denied. *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248, 257."

There is no question in the case at bar that the defendant's rights under the Federal Act were promptly and definitely and repeatedly asserted in the trial court, and again in the court of appeals, and that they were treated in the Court of Appeals as having been sufficiently raised.

In the case of *Railroad* v. *Zachary*, 232 U. S. 248, an action was brought by the plaintiff to recover dam-

ages on account of the death of an employee of the railroad company, and the defendant's Answer besides denying the allegations of negligence, set up as a special defense that at the time plaintiff's intestate was killed, he was engaged in interstate commerce as an employee, and that the liability of the defendant to him, or to the plaintiff as his representative was fixed and regulated by the Federal Employers' Liability Act, and that under that Act the plaintiff was not entitled to recover. In the opinion in that case this court said (p. 257):

> "In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of State practice; and since it appears that defendant expressly claimed immunity by reason of the Act of Congress, and the highest court of the State either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."

We respectfully submit that the record properly presents Federal questions which give this court jurisdiction.

2. The Defendant in Error complains that the Assignments of Error are too general and indefinite, citing the case of *Central Vermont R. R. Co.* v. *White, Admr.*, 238 U. S. 507. What was said in that case does

not apply to the Assignments of Error in this case. There are only fourteen assignments of error in this case, and they do no more than to briefly and concisely present to this court the rulings of the trial and appellate court upon the rights asserted by the Plaintiff in Error under the Federal Employers' Liability Act. This is exactly what this court, in the White case, said should be done. In view of the different ways in which the defendant's rights under the Federal Employers' Liability Act were necessarily presented to the trial and appellate court, it is difficult to see how the assignments of error could very well have been other than as made, in order to present the same questions to this court. We observe that in the case of *St. Louis, Iron Mountain, etc. R. R. Co.* v. *McWhirter*, 229 U. S. 227, the Plaintiff in Error assigned twenty-two alleged errors, and there was no suggestion by this court in that case that the assignments were too numerous.

II.

The Federal questions presented are not frivolous.

The second ground of the motion to dismiss or affirm filed on behalf of Defendant in Error, is as follows:

> "To affirm the judgment and decision of the Kansas City Court of Appeals of the State of Missouri, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions on which the decision of this case depends are so frivolous as not to need further argument"

1. The plaintiff in error first argues, and cites cases in support of the argument, that this court will accept the findings of the state appellate court upon matters of fact as conclusive.

We have no contention to make with respect to the application of that doctrine in the cases cited: but in a case where as here the question is presented whether under the entire evidence, the state law or the federal law is applicable, and whether under the entire evidence there could be liability under the federal law, it would practically amount to a denial to defendant of its federal rights to say that this court is limited to the facts as found by the appellate court. Under such circumstances, this court clearly can inquire into and analyze the evidence as shown by the record.

In the case of *Railroad Co.* v. *Zachary*, 232 U. S. l. c. 258, where the questions presented were similar to those in the case at bar, this court said:

> "But it is now insisted that there was no evidence tending to show that deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted federal right."

In the case of *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, l. c. 611, this court again said (italics ours):

> "It is insisted (a) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free

> interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted federal right. *The insistance as to the power and duty of this court in such a case is well founded.*"

2. The statement of facts contained in the majority opinion of the Court of Appeals with respect to the nature of the work in which the deceased was engaged at the time of his death is partly correct. It is incorrect in that there is absolutely no evidence that any of the engines which were supplied with fuel from the coal chutes which were being filled, were engaged exclusively in *intrastate* commerce, and no evidence that any of the defendant's trains operated in this state were engaged exclusively in *intrastate* commerce, and there is absolutely no evidence that the coal in question was brought from mines within the State of Missouri, or that they were brought from defendant's mines. So far as we know, the defendant has no mines, and the record is absolutely silent on this subject. We are at a complete loss to know how the Court of Appeals could have got-

ten the notion that the defendant railroad company owned any mines, or that the coal in question was being transported from any mines in the State of Missouri.

The undisputed facts, as shown by the record, and by the opinion of the Court of Appeals, with respect to the employment of the deceased, are in substance as follows:

Defendant railroad company was a common carrier engaged in interstate commerce, and had large terminal yards at Kansas City, Missouri. The deceased was a switchman, and with the other members of his crew, was continuously employed and engaged in switching cars used in interstate commerce. The accident in question occurred at 7:00 o'clock in the morning, and during the night preceding the accident, the deceased, with other members of the switching crew, had been so engaged. At the precise time of the accident, he and the other members of his crew, were engaged in switching three cars loaded with coal from the company's storage tracks to the company's coal chutes, for the purpose of supplying engines with fuel, which engines were engaged in interstate commerce. This included his own and other switch engines. This coal was owned by the company and had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.

The question presented, therefore, is, whether an employe of a railroad company engaged in interstate commerce, and who receives injuries while employed in

supplying fuel for his own and other engines engaged in interstate commerce, comes within the provision of the Federal Employers' Liability Act.

Precisely this same question has been presented to the Appellate Courts of several states, and in each instance, it has been held that such employee was engaged in interstate commerce, and one of these cases, *Horton* v. *Navigation Co., 72* Wash. 503, 130 Pac. Rep. 897, was cited with approval by this court in the case of *Pedersen* v. *R. R. Co., 229* U. S. 146, l. c. 153.

In the case of *Pedersen* v. *Railroad, supra,* the employee was engaged in carrying bolts and rivets to be used in repairing a bridge which was used to carry both interstate and intrastate trains, and it was held that this was an act necessary to be performed in order to enable the railroad company to carry on its work as an interstate carrier, and the employee was therefore employed in interstate commerce.

In the case of *Horton* v. *Navigation Co., 72* Wash. 503, 130 Pac. 897, which case is cited with approval by this court in the Pedersen case, the deceased employee was a pumper, who had charge of the pumping plant used to supply water (instead of coal as in the case at bar) for engines engaged in interstate commerce, and the court held that such deceased employe was engaged and employed in interstate commerce.

In the case of *Kamboris* v. *Navigation Co.* (Oregon, March 23, 1915), 146 Pac. 1097, the employee was

engaged in switching coal into the company's coal chutes to be used in firing engines engaged in interstate commerce, precisely the same as in the case at bar, and the court held that the employee was engaged and employed in interstate commerce.

In the case of *Barlow* v. *Railroad Co.*, 143 N. Y. Suppl. 1053, the employe was engaged in switching coal into the company's coal chutes to be used in firing engines engaged in interstate commerce, precisely the same as in the case at bar, and the court held that such employe was employed and engaged in interstate commerce.

In the case of *Montgomery* v. *Railroad Co.*, 64 Ore. 597, 131 Pac. 507, the employe was engaged in switching oil for use as engine fuel, precisely the same as in the case at bar, excepting that the fuel was oil instead of coal, and the court unhesitatingly held and declared that the employe was engaged and employed in interstate commerce.

In the case of *Cousins* v. *Ill. Central R. R. Co.* (Minn.) 148 N. W. 58, the employe was injured while wheeling a barrow of coal, instead of switching a carload of coal as in the case at bar, such coal to be used to heat the shops in which other employes were engaged in making repairs to cars that had been or were being used in interstate commerce, and the court unhesitatingly held that such employe was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

In the case of *Ambruster* v. *Railroad* (Iowa), 147 N. W. 337, an employe was killed while coaling an engine to be subsequently used in interstate commerce, and it was held that he was engaged in interstate commerce, and that the widow could not maintain the action.

In the case of *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, an employe piloting an engine through the switch yards to be thereafter attached to a train engaging in interstate commerce, was permitted to sue under the Federal Employers' Liability Act for injuries sustained.

In the case of *Railroad* v. *Scale*, 229 U. S. 156, the employe was a yard clerk, and while on his way to inspect a train, including cars with both interstate and intrastate shipments, was struck by a switch engine, and it was held that at the time of the injury he was engaged in performing work which was necessary to be done in order to enable the company to carry out its function of an interstate carrier, and that the Act applied.

In the case of *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, it was held that a fireman who had been engaged in cleaning an engine which was to be used to haul a local intrastate train, to which it had not yet been coupled, was engaged in interstate commerce, because there were empty cars from a point beyond the state which were to be hauled in that train, and the court so held notwithstanding the fact that at the precise time of the injury and death, the deceased had left his work on the engine, and was on the way to his boarding house.

In the case of *Macrkl* v. *Railroad* (C. C. A.), 196 Fed. 1, an employe in the repair shops was engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce, and it was held that he was employed in interstate commerce, although not actually engaged in carrying or transporting any subject of commerce, because his work was a necessary element to be performed to enable the railroad company to carry on its business as an interstate carrier. This case is also cited with approval by this court in the Pedersen case.

The reasoning in the Pedersen case (229 U. S. 146) alone, indicates that the deceased Harrington was employed in interstate commerce within the meaning of the Federal Employers' Liability Act. In that case the employee was carrying bolts from the storage house to the bridge, for use on a bridge used for both kinds of commerce, and in this case the employee was transporting coal from the storage tracks to the chutes for use in firing interstate engines. There is no logical distinction between the supplying of bolts for use on a bridge used in both kinds of commerce, and the supplying of fuel for use on engines engaged in interstate commerce.

In the Pedersen case this court said (229 U. S. l. c. 152):

> "The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be

> done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See *Lamphere* v. *Oregon R. & Navigation Co.*, 196 Fed. Rep. 336; *Horton* v. *Oregon, etc. Co.*, 130 Pac. Rep. 897; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21."

If the carrying of the bolts to the bridge was necessary to the repairing of the bridge, and the repairing of the bridge was a necessary part of the interstate commerce in which the carrier was engaged, then it inevitably follows that the carrying of the coal to the coal bins for use in firing engines engaged in interstate commerce was a part of the interstate commerce, in which the carrier was engaged.

This court there says that the carrying of the bolts "was a minor task, which was essentially a part of the larger one, *as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce.*" Manifestly, if it is important to take the engine from the roundhouse to the track on which are the cars to be hauled, it is just as important to supply that engine with fuel in order that it may haul the cars after it gets there. There can be no doubt that it is all a part of one work, and that work is the carrying on of interstate commerce.

In support of that part of its opinion last above quoted, this court cites with approval, among others, the case of *Horton* v. *Oregon. etc. Co.*, 130 Pac. Rep. 897, already referred to. In that case, the deceased was a pumper who had charge of a pumping plant, which was used to supply water to engines engaged in interstate commerce. At the time of the accident the deceased was on his way to take charge of the plant. The court there says:

> "Tested by the criterion laid down in the Second Employers' Liability Cases, *supra,* and exemplified in the foregoing decisions, namely, by the effect of the injury upon interstate commerce, it seems to us too plain for cavil that the deceased, when killed, was employed by the carrier in such commerce, within the meaning of the Act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master as well as the local trains, must have ceased altogether. This demonstrates the 'real or substantial' connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged, and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine-spun, and diaphanous for ordinary perception. To hold that there is any material dis-

> tincton would be as unjust as artficial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor in instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to those, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice."

In the case of *Barlow* v. *Railroad*, 143 N. Y. Suppl. 1053, previously referred to, the facts so far as the question of employment are concerned were substantially the same as those in the case at bar. The employe was engaged in switching coal into the coal chutes, to be used in firing engines engaged in interstate commerce, and the court held upon the authority of the Pedersen case that the employe was employed in interstate commerce, within the meaning of the Federal Employers' Liability Act. After a full review of the authorities, the court says:

> "Undoubtedly the ultimate destination of the three carloads of coal was the coal pockets, which could only be reached by running the cars upon the trestle. Depositing the coal in the pockets was one step towards placing it in the tenders of the locomotive. How different would have been the liability of the defendant if plaintiff had been injured while dumping the coal directly into the tender of the locomotive attached to a train engaged in interstate commerce?
>
> Coal for use in defendant's locomotives was as indispensable to the defendant engaging in interstate commerce as was a track or safe bridge upon which defendant might operate its trains."

Again, in the case of *Montgomery* v. *Railroad*, 64 Ore. 597, 131 Pac. 507, above cited, the facts so far as the question of employment is concerned, were exactly the same as the case at bar. There the employes were switching oil for engine fuel instead of coal. In that case the Supreme Court of Oregon reviewed fully all of the Federal decisions, including the Pedersen case, and came to the conclusion that there was no question but that the employment came within the scope of the Federal Employers' Liability Act.

The court in its opinion says, in part, as follows:

> "As will be noticed, the evidence tended to show that the plaintiff was engaged in moving the oil for the purpose of providing fuel for the engines used in transmitting freight and passengers from California into Oregon. The oil was to be used principally for the engine and crew with which plaintiff was engaged in his general work of switching interstate cars and spotting, setting out and moving them from station to station. It appears that about two-thirds of the work of plaintiff, of switch crew and engine was the moving of cars used in the transportation of interstate commodities, although all of the plaintiff's work was done in the State of California.
>
> * * * * * *
>
> Was not the act which plaintiff was performing at the time of the accident just as essential to interstate commerce as the repairing or the pulling of the throttle of an engine used in such traffic? It was a necessary act in the transmission of interstate freight, and all who co-operated in the work were engaged in interstate commerce within the meaning of the Act of Congress. It was closely connected

with his general duties. Oil is the food that gives life and strength to the engine, furnishing the motive power for the transportation of interstate freight, and by the aid of which a stream of commerce flows from state to state and from state to foreign nations. To illustrate, draw a line to represent the boundary between two states; draw another line, crossing the first, to represent the stream of interstate commerce. Whatever act in a substantial manner aids, accelerates, or increases the amount of, or furnishes a part of the supply for, such stream, and is connected therewith, to the same extent may be said to aid, support and maintain the act of interstate commerce. Such labor makes interstate commerce more secure, more reliable and more effective. Suppose that all the agents, engaged in providing oil to be used, should cease to act, for instance, on account of a boycott or by reason of an injunction order issued by a state court for some purpose conceived to be good (a violent assumption), and there was a failure of the supply of fuel and both the switch and interstate engines were compelled to stop, the stream of interstate commerce would also stop or be lessened to the same extent. What court or lawyer would say that under these circumstances there was not a substantial interference with interstate commerce?"

This case does not turn upon the question whether the coal was being *moved* between two points in the same state, or between states. It is not a question of transportation at all. It is a question of a service being performed by an employe, in order to enable the company to carry on the larger work of interstate transportation. With this in mind, it seems impossible to distinguish it from the Pedersen case, or any one of the long line of

decisions, construing the Federal Employers' Liability Act.

As already pointed out, the deceased and his crew, and other crews at the terminal yards, were continuously engaged in switching cars engaged in interstate commerce. As a part of their work and in order to enable them to carry it on, it was necessary for them to place coal in the chutes to supply their engines and also the road engines used to haul trains engaged in interstate commerce. The supplying of their engines with coal was all a part of their employment in interstate commerce just the same as oiling or cleaning or repairing their engines or taking them from the roundhouse to the trains which they were to haul.

In the case of *Railroad* v. *Zachary*, 232 U. S. 248, the employe was inspecting, oiling, firing and preparing his engine for a trip, in which it was to haul cars in interstate commerce. It had not yet been attached to the train, but the court there held that under the reasoning in the Pedersen case, the work being performed was a part of the larger task, and was a necessary part of the interstate commerce, in which the carrier was engaged. How can it be consistently argued that the supplying of an engine with oil, and the cleaning of it before it had been attached to the cars, is any more a part of interstate commerce than the supplying of coal to be used in the engine for fuel? And so it is with each one of the cases already cited. In most of those cases the employe, as in this case, was engaged in performing some preliminary

work which was a necessary and essential "part of the interstate commerce in which the carrier was engaged," and he was therefore held to be employed in interstate commerce.

We again call special attention to the case of *Maerkl* v. *Railroad* (C. C. A.), 198 Fed. 1, and to the case of *Law* v. *Railroad* (C. C. A.), 208 Fed. 869. In the first case, the employe was engaged in the shops in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce, and in the latter case the employe was employed in the shops and was engaged in repairing an engine regularly used in interstate commerce. In neither case was the employe engaged in moving the subjects of commerce, but he was engaged in performing a service relating to an instrumentality of commerce—in one case a car and in the other an engine. In these cases it was held that since the car and the engine were instrumentalities belonging to the company used in interstate commerce, the work which was being done on them was a necessary and essential part of interstate commerce. Under the same reasoning there can be no doubt that the coal which had been bought and paid for by the company, and placed on its storage tracks for use in firing engines engaged in interstate commerce was an instrumentality of interstate commerce, and the work which was being done by Mr. Harrington in supplying that coal for use in firing his own and other engines for use in interstate commerce was a necessary and essential part of the interstate commerce, in which the company was engaged.

In the case of *Kamboris* v. *Navigation Co.* (Ore. March 23, 1915), 146 Pac. 1097, it appears that the defendant company supplied coal for its engines in exactly the same manner as in the case at bar; that certain of the cars had been switched into the coal chutes, and that the employe, Kamboris, at the time of the injury, was employed in shoveling coal from the cars which were standing in the chutes into the pockets or bins of the chutes. The Supreme Court of Oregon, after carefully considering the decisions of the Supreme Court of the United States, and the various states, including the Pedersen case, says as follows:

> "In the case at bar we cannot see why the act of furnishing the coal for fuel, and placing the same in the pockets of the chute to be used partly in the engines engaged in interstate traffic, was not just as essential in the matter of running interstate trains as the act of taking the same out of such chute or pockets, and placing it upon the tenders of the engines, or any other act of the employes in running the engines and transporting such commodities. If it were impossible to fill the position of the deceased, and the coal was not furnished, interstate commerce would stop or be retarded to that extent, and it clearly seems to us that the general duties of the decedent, as well as the act he was performing at the particular time of the injury, had a very substantial bearing upon and relation to interstate commerce. It cannot be said consistently that the decedent was not engaged in his duty because he was waiting for the cars to approach the proper place in order to block the wheels. It might as well be said that a switchman was not engaged in his duty while waiting for a train to pass a

> switch in order to turn the same. The act of placing the cars of coal in the chute was similar to decedent's general duties of shoveling coal, and was a necessary service in preparing the fuel for the engines hauling the interstate trains. The case in this respect is like *Montgomery* v. *S. P. Co., supra,* where we considered and discussed this question as carefully as we could and *Horton* v. *O. W. R. & N. Co. supra.* From the practically admitted facts in the case at bar we conclude the defendant was engaged in interstate commerce at the time of the injury, and that the decedent was employed by the defendant in such commerce, and was within the protection of the action in question."

There is no possible basis for distinguishing that case from the case at bar. In the Harrington case, the employe was switching the cars into the coal chutes, and in the Kamboris case the employe was unloading the coal from the cars after they had been switched into the coal chutes and shoveling it into the coal bins. The employment was of the same character, and for the same purpose, and to the same effect.

In the case of *Railroad* v. *Zachary*, 232 U. S. 248, this court said:

> "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro.* It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that

> the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson* v. *Del. Lack. & Western R. Co.*, 229 U. S. 146, 151; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 161."

It is perfectly apparent that in the case at bar the work in which the deceased was engaged of supplying fuel for his own and other switch engines engaged in switching cars used in interstate commerce, and for road engines engaged in hauling trains used in interstate commerce is just as much a part, and just as directly connected with interstate commerce as that of the employe in the Zachary case, who was oiling and preparing his engine for use in interstate commerce, although the engine had not as yet been coupled up.

In the recent case of *Great Northern Railway Co.* v. *Knapp*, decided by this court March 20th, 1916, it was conceded that an employee engaged in working with a gasoline engine used for pumping water for engines used in interstate commerce, was employed in interstate commerce.

In the light of the undisputed facts in the case at bar, and the foregoing decisions, and the reasoning thereof, we respectfully submit that the Federal questions are not only not frivolous, but that clearly the deceased was engaged and employed in interstate commerce, and that the provisions of the Federal Act apply.

III.

The plaintiff is not the proper party to maintain the action.

Since it appears that the defendant was engaged, and the deceased employed in interstate commerce, and that the question of liability, if any, is controlled solely by the Federal Employers' Liability Act, it follows that the only person who was entitled to maintain or prosecute an action on account of the death of the deceased is his personal representative, and that the plaintiff (defendant in error) is not the proper party to maintain the action.

American Railroad Co. v. *Birch*, 224 U. S. 547.
Railroad v. *Seale*, 229 U. S. 156.
Rich v. *Railroad*, 166 Mo. App. 379.
Thompson v. *Railroad*, 262 Mo. 468.
Hearst v. *Railroad*, 188 Mo. App. 36.
Railway v. *Brothers* (Tex.) 165 S. W. 488.
Penny v. *Railroad* (La.), 66 So. 313.
Eastern Railroad Co. v. *Ellis* (Tex.), 153 S. W. 701.
K. C. M. & O. Railroad Co. v. *Pope* (Tex.), 152 S. W. 185, affirmed on rehearing 153 S. W. 163.
Rivera v. *Railway Co.* (Tex.) 149 S. W. 223.
Railroad Co. v. *Lester* (Tex.) 149 S. W. 841.

In the case of *Railroad Co.* v. *Birch, supra,* this court held that an action could not be maintained for the death of an employee by his heirs but that it must be maintained by the personal representative, and no other.

In the case of *Railroad Co.* v. *Seale*, 229 U. S. 156, this court likewise held that the widow and parent of an employee could not maintain an action under the Federal Act, but that such action must be prosecuted by the personal representative and no other.

In that case the court said (p. 161):

> "When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited."

In the case of *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. l. c. 256, it was said:

> "It is not disputed that if the provisions of the federal act had been applied, the result of the action might have been different. To mention only one matter: there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin."

The Appellate Courts of the State of Missouri recognize that an action cannot be maintained under the Federal Act by other than the personal representative of the deceased employe.

Rich v. *Railroad,* 166 Mo. App. 379.
Thompson v. *Railroad,* 262 Mo. 468.
Hearst v. *Railroad,* 188 Mo. App. 36.

See, also:

Moliter v. *Wabash,* 180 Mo. App. 84.
Toledo, St. Louis & Western R. R. Co. v. *Slavins,* 236 U. S. 454.

IV.

The proof is not sufficient to make out a case under the Federal Employers' Liability Act.

The defendant in error contends that the plaintiff in error is not injured by reason of the fact that the case was tried under the state laws, instead of under the federal laws. On the contrary the defendant expects to demonstrate conclusively that even if the action had been brought by the personal representative under the Federal Employers' Liability Act, still there could be no recovery, because the facts do not make out a case under the terms of that Act.

Briefly some of the reasons why there could be no recovery under the Federal Act, are as follows:

As heretofore stated, the record shows conclusively that the last time Mr. Harrington was seen riding on the empty coal car, he was at a point about ten feet

outside of the coal shed; that immediately thereafter, when about six or eight feet outside of the coal shed, he was seen to "go down" between the cars; that thereafter his body was found on the tracks about six or eight feet outside of the entrance to the coal shed; at just about the point where he was seen to "go down" between the cars; that on the morning of the accident it was "awful cold" and "frosty and hazy;" that the cars were "sleety and icy;" and that the end of the empty car upon which Mr. Harrington was riding had been exposed to the weather during the night, and was no doubt covered with sleet and frost. The accident occurred about 7:00 o'clock in the morning.

It further appears from the evidence that Mr. Harrington was riding up the incline on the empty car for the purpose of uncoupling the loaded cars after they had been properly located in the chute.

The only natural, logical and legitimate inference which may be drawn from the foregoing facts is that just before Mr. Harrington reached the coal shed he started to get down from the place where he was riding on the empty car in order to uncouple the cars after they were "spotted" or properly located in the coal sheds, and that as he started to do this he was caused to slip or fall by reason of the frost or sleet on the coal cars, by reason of the ordinary movement of the cars, and that he fell at the time he was seen to fall by the witness, Culley, and was run over on the tracks at the point where his body was subsequently found, and that he

never at any time entered the coal shed. If he had fallen at this point, as all of the facts seem to indicate, his body would have been run over by the south truck of the empty car on which he was riding as it entered the chute, and would have been again run over by those trucks as the car was pulled over the chute, and this would have caused the mutilation and the presence of the coal dust and cinders which were found on the body. There is no evidence that there was coal dust or cinders either within or without the sheds, and it is reasonable to suppose that there was coal dust and cinders just outside the entrance to the shed as well as within.

It therefore appears from the evidence that the accident was in all probability due to causes for which the defendant was not liable. In fact, if plaintiff were trying to show as a basis for recovery, that the deceased had slipped by reason of the "sleet and ice," or the natural movement of the car, while getting ready to make the uncoupling, and had fallen to the track where found, it would doubtless be held that this was a legitimate inference from the facts. The "sleety and icy" condition of the cars were risks which were assumed, and for which the defendant would not be liable, but the inference is none the less a legitimate one.

In the face of the foregoing inferences, which are the only natural and logical inferences to be drawn, there is no basis in law for the strained, unnatural and illogical inferences which plaintiff is seeking to have drawn in order to make out her case, to-wit: that after

the deceased was last seen alive about ten feet outside of the coal chute, he continued in the same position until the cars were pushed about fifteen feet inside of the chute (although no one saw him enter the chute and witnesses who were inside the chute and in a position to have seen him, did not see him), and further that he then fell off the cars (although no one saw him fall), and further that he was then dragged back about 25 feet to where his body was found (although no evidence that he was thus dragged was produced). All this is nothing but conjecture.

No principle is better established in law, than that it is necessary in suits of this character, for the plaintiff to allege and prove a causal connection between the injury and the negligence alleged; and that where the evidence shows that the accident might have been due to more than one cause, for some of which the defendant would not be liable, then the plaintiff has failed to make out his case and there is nothing to submit to the jury. A case can not be pieced out by conjecture.

Patton v. *Railway*, 179 U. S. l. c. 663.
Perkins v. *Railroad*, 193 Fed. 219.
Rogers v. *Hammond Packing Co.*, 167 Mo. App. 49.
Fowler v. *Elevator Co.*, 143 Mo. App. 422.
Byerly v. *Light Co.*, 130 Mo. App. 593.
Rogers v. *Hammond Packing Co.*, 180 Mo. App. 227.
Goransson v. *Mfg. Co.*, 186 Mo. 300.

In the case of *Patton* v. *Railway*, 179 U. S. 653, this court said (p. 663):

> "Upon these faces we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Company* v. *Pollard*, 22 Wall. 341; *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435, 443, a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third.

> That while the employer is bound to provide a safe place and safe machinery in which and with which the employe is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe."

This rule is also well expressed in the opinion of Judge Johnson, in the case of *Byerly* v. *Light Company*, 130 Mo. App. 593, l. c. 603:

> "Finding that defendant was negligent, the next subject of inquiry is whether the evidence reasonably supports the inference that such negligence was the producing cause of Byerly's death. We sanction the contention of plaintiff that the causal connection need not be shown by direct and positive evidence, but may be shown by other facts and circumstances and that in the consideration of a demurrer to the evidence, every reasonable inference should be indulged in favor of the plaintiff. But the rule is elemental that the burden remains with plaintiff to the end of the case to establish by proof not only the fact of the negligence averred, but also to show a direct connection between such negligence and the injury. Where the ultimate fact is not susceptible of direct proof, its existence must directly follow as a reasonable conclusion from its basic facts and circumstances, and it may be stated as an axiomatic rule that whenever court or jury is left by the evidence in a situation where, in order to find the ultimate fact alleged they must piece out the facts adduced with conjecture or supposition, the plaintiff must be held to have failed in his proof. Where the evidence shows the injury might have been caused by the negligent act, but, in its aspect

> most favorable to plaintiff, is just as consistent with the inference that that injury might have been produced by another cause, to send the case to the jury would be to accord them the right to make an arbitrary choice between equally probable but unproved conclusions and thus the verdict, if for the plaintiff, would be based not entirely on evidence, but in part on mere speculation and conjecture. This would mean a reversal of the rule imposing the burden of proof on the plaintiff, since the defendant, in order to prevent the jury from making him the victim of conjecture, would be forced to assume the burden of showing that his negligence did not produce the injury."

In the Perkins case (193 Fed. 219) *supra*, the allegations of negligence and the proof in support thereof, are very similar to the allegations and proof in the case at bar. The missing links in that case were almost the same as those in this case, and the court there held that the whole case rested upon conjecture, guess work and speculation, and again announced the rule that "in cases of this character it is incumbent upon the plaintiff to show not only negligence upon the part of the master, but causal connection between that negligence and the injury complained of."

It is too clear for argument that the plaintiff has failed to produce any substantial evidence as to the cause of the accident and that from all the evidence in the case it is much more plausible to infer that the accident happened from some cause for which the defendant company was not liable.

From what has already been said, it will be seen that in order to reach the conclusion contended for by plaintiff, that Mr. Harrington was thrown from his position on the empty coal car by reason of the coal cars striking the sand car, and then dragged to the place where his body was found, it is first necessary to infer that he remained in his position on the empty car until the time of the collision, although no witness saw him enter the coal chute on the empty car, and one witness saw him fall from the car before it entered, and another witness who was in a position to have seen him if he had entered, testified that he did not see him on the car when it entered, and the car upon which Harrington was riding was sleety and icy, and his body was found at a point six or eight feet outside the entrance to the chute, exactly where it would have been if he had fallen as testified by one of the witnesses.

It is then necessary to infer that after proceeding into the coal chute to the point of the collision, Mr. Harrington was thrown from his position to the tracks by reason of the force of the shock, although there is no evidence that this occurred and the witnesses who were in a position to have known of such an accident, knew nothing of it.

It is then necessary to infer that after having been thrown from the car, Mr. Harrington's body was dragged from a point twenty or twenty-five feet inside the coal chute to a point six or eight feet outside the entrance to the chute, although there is no evidence that there were

any marks or indications of dragging on the rails, and the physical facts demonstrate that if he had been dragged back by the cars, his body would have been found just inside of the coal chute instead of outside of the coal chute, where it was found.

The plaintiff's whole case is built upon the contention that the evidence of the mutilation of the body, and the presence of coal dust and cinders, is sufficient to give rise to an inference that Mr. Harrington continued to remain in his position on the empty car until the time of the collision, and that he was then thrown from the empty car to the track, and that he was then dragged back by the cars to the place where his body was found. The mutilation of the body, and the presence of coal dust and cinders on his body, standing alone, certainly cannot be a basis for all of these inferences, especially when it is just as consistent with the natural and probable inference that he fell or slipped from the cars at the time he was getting down to uncouple them just before entering the shed. If he had fallen at that time, his body would have been run over by the south truck of the empty car on which he was riding, as it entered, and would have again been run over by those trucks when they came out of the coal chute, and the running over the body twice (as would be the case if he had fallen outside the chute, as the physical facts show), would have been more likely to have caused the mutilation and the presence of coal dust and cinders described by the witnesses than if the body had been simply dragged along the track from one

point to another. There was as likely to be coal dust and cinders just without the chute as within, and the running over the body would be more likely to cause the character of mutilation described than the mere dragging of it.

We therefore respectfully submit that there is no basis for the contention of defendant in error, that the plaintiff in error was not injured by reason of the fact that the state laws were applied instead of the Federal Employers' Liability Act.

V.

As to Placing the Case on the Summary Docket.

We respectfully submit to the court that in view of the questions, among others, presented by the record in this case, *first*, as to whether the deceased was employed in interstate commerce at the time of the accident resulting in his death, and *second*, whether the defendant in error (plaintiff below) was the proper person to maintain the action, and *third*, whether under the facts of the case there would be any liability under the Federal Employers' Liability Act, and other similar questions, there is too much involved to warrant this case being placed on the summary docket.

In addition to this, the decision of the Court of Appeals possibly presents a larger question: That decision as shown by the majority opinion, turns chiefly upon a consideration of the two Employers' Liability Cases (Employers' Liability Cases, 207 U. S. 463, Second Employers' Liability Cases, 223 U. S. 1), and the Peder-

sen and Behrens cases (*Pederson* v. *Railroad*, 229 U. S. 146, *Illinois Central Ry. Co.* v. *Behrens*, 233 U. S. 473).

The test as to when an employee is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, was anounced in the Pedersen case, and it was held in that case that the employee was so engaged. In the Behrens case, it was held that the employee was not engaged in interstate commerce, because at the precise time of the injury, he was switching cars ~~to be~~ used exclusively in ~~int[illegible]state~~ interstate commerce, and was not working with any instrumentality of interstate commerce.

In considering the question whether an employee is engaged and employed in interstate commerce at the time of an injury, the Pedersen, Behrens cases are more frequently cited than any others as the leading cases upon that question. The Kansas City Court of Appeals, however, places a construction upon the First Employers' Liability Cases, which we are satisfied is narrower than is intended by this court, and which we submit is not in accordance with the subsequent interpretation of that decision by this court; and also places a construction upon what is said by this court in the Pedersen case, which is contrary to the spirit of that decision of subsequent decisions of this court.

In the recent case of *New York Central & Hudson R. R. Co.* v. *Bernard J. Carr,* 238 U. S. 260, this court held that:

> "Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

It seems apparent from the decision of this court in the Carr case, that it has definitely committed itself to a liberal construction of the Federal Employers' Liability Act, and to a broad application of the tests announced in the Pederson case (229 U. S. 146) and in the Zachary case (223 U. S. 248), as to what constitutes employment in interstate commerce, and that the ruling announced by it in the Behrens case, 233 U. S. 473, would not be extended beyond the facts of that case.

In the light of the questions presented by the record in this case, and of what is said by the Court of Appeals with respect to the two Employers' Liability Cases, and with respect to the Pederson case and the Behrens case, we submit that some discussion of the logical effect of those cases, and of subsequent decisions will be of importance, and such that the case cannot be presented satisfactorily to the court or to the parties interested in the short time given to cases placed on the summary docket.

We respectfully submit that the motion of defendant in error to dismiss or affirm the case should be overruled, and that the motion to place the case on the summary docket should be overruled.

Respectfully submitted,

WILLIAM WARNER,
OLIVER H. DEAN,
WILLIAM D. MCLEOD,
H. M. LANGWORTHY,
Attorneys for Plaintiff in Error.

O. M. SPENCER,
Of Counsel.

The Federal Employers' Liability Act refers to interstate commerce in a practical sense; and the test is whether the employee at the time of the injury was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556.
180 S. W. Rep. 443, affirmed.

THE facts, which involve the validity of a judgment for damages recovered by the representative of an employee of an interstate carrier in the state court and under the state law, are stated in the opinion.

Mr. J. G. L. Harvey for defendant in error in support of the motion.

Mr. William Warner, Mr. Oliver H. Dean, Mr. William D. McLeod, Mr. O. M. Spencer and *Mr. H. M. Langworthy* for plaintiff in error in opposition thereto.

MR. JUSTICE HUGHES delivered the opinion of the court.

Margaret Harrington brought this action to recover damages for the death of her husband, Patrick Harrington, a switchman employed by the plaintiff in error. She obtained judgment under the state law, the plaintiff in error contending unsuccessfully that the decedent was engaged in interstate commerce and that the case was governed by the Federal Employers' Liability Act. 180 S. W. Rep. 443. The state court said, in its statement of facts:

"Defendant owns and operates a system of railroads covering this and a number of other western States and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars

used in both kinds of traffic are received, sent out, cared for and repaired in the yards. The switching crew of which Harrington was a member did not work outside of this State and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic.—It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this State which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce."

The plaintiff in error takes exception to the statement in part, asserting that there was no evidence that any of the locomotives, which were supplied with fuel from the coal chutes, were engaged exclusively in intrastate commerce, or that any of the defendant's trains within the State were engaged exclusively in that commerce. For the present purpose, we may assume the fact to be as stated by the plaintiff in error, and we may also assume, as it insists, that there was no evidence that the coal had been brought from mines within the State of Missouri or from mines owned by the plaintiff in error. With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the Company and "had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident." So, also, as the question is with respect to the employment of the decedent at the time of the injury (*Illinois*

Central R. R. v. *Behrens*, 233 U. S. 473, 478), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.

As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and "the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act (*Del., Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439), and there is no distinction in principle between the two cases. In *Great Northern Ry.* v. *Knapp*, 240 U. S. 464, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal statute was conceded in the state court.

Judgment affirmed.